Maryland Law Review

Volume 63 | Issue 1 Article 7

Exile and the Kingdom: Integration, Harassment, and the Americans with Disabilities Act

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EXILE AND THE KINGDOM: INTEGRATION, HARASSMENT, AND THE AMERICANS WITH DISABILITIES ACT

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Disability discrimination is more than thoughtlessness or failure to modify standing operating procedures to accommodate people with disabilities. Frequently, it takes the form of verbal or physical abuse that keeps people with disabilities from exercising employment and educational rights that the Americans with Disabilities Act[1] and other laws[2] have established to achieve the integration of individuals with disabilities into mainstream society on terms of equality with other citizens.

This Article is part of a multi-part study of harassment on the basis of disability. In two recent articles,[3] I have described the nature of disability harassment and the existing legal remedies for it, and then tried to advance suggestions for reform of the current law. In the employment area, I advocate the use of the specific ADA provision that bars all interference, coercion, threats, and intimidation[4] to supplement the current judicial approach, which draws an analogy to Title VII of the Civil Rights Act of 1964 and provides relief only when there is severe or pervasive mistreatment constituting a hostile environment.[5] In the educational field, I advocate the recognition of a damages remedy,[6] which would not have to be exhausted through administrative procedures.[7]

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1. 42 U.S.C. §§ 12101-12213 (2000).

2. Other statutes of particular relevance include section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 (2000), and the Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400-1487 (2000).

3. Mark C. Weber, *Disability Harassment in the Public Schools*, 43 WM. & MARY L. REV. 1079 (2002) [hereinafter *School Harassment*]; Mark C. Weber, *Workplace Harassment Claims Under the Americans with Disabilities Act: A New Interpretation*, 14 STAN. L. & POL'Y REV. 241 (2003) [hereinafter *Workplace Harassment Claims*].

4. 42 U.S.C. § 12203(b) (2000).

5. Weber, *Workplace Harassment Claims*, *supra* note 3, at 253-64 (distinguishing cases in which the "severe and pervasive" standard—applied in instances of sex and race discrimination—was used to determine the validity of disability harassment claims).

6. *See* Weber, *School Harassment*, *supra* note 3, at 1085-90.

7. *Id.*

My goal in this Article is to connect the threads of workplace and educational disability harassment to the historical exclusion of people with disabilities from mainstream life,[8] then survey the existing legal means to remedy both harassment and the segregation on account of disability that it creates.[9] My conclusion is that much more remains to be done to protect people with disabilities from the pervasive verbal and physical abuse that continues to keep them from taking advantage of employment and educational opportunities.[10] The steps I advocate embrace the use of the legal remedies I have described in the other articles, but they also include changes in vocational and welfare programs;[11] voluntary actions by educators,[12] employers, and others;[13] and efforts to recast the social perception of disability to make up for the decades of legally enforced exclusion and the harassment that exclusion engenders.[14]

Other scholars have addressed disability harassment, primarily exploring the analogy between hostile environment cases under Title VII and under the ADA.[15] The contribution to the literature that my

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8. *See infra* notes 115-152 and accompanying text (discussing the effects of segregation and harassment in employment and educational settings).

9. *See infra* notes 153-198 and accompanying text (reviewing causes of action for disability discrimination and harassment).

10. *See infra* notes 270-274 and accompanying text (suggesting multiple legal and societal reforms that would facilitate the integration of people with disabilities into mainstream society).

11. *See infra* notes 260-270 and accompanying text (proposing a system of partial disability benefits for individuals with disabilities).

12. *See infra* notes 257-259 and accompanying text (encouraging schools to adopt policies against harassment).

13. *See infra* notes 249-256 and accompanying text (stating that employers can deter harassment through training of employees, encouraging employees to file complaints, and by imposing sanctions when harassment occurs).

14. *See infra* notes 270-273 and accompanying text (discussing the importance of focusing on social relationships rather than social categories).

15. *See* Eric Matusewitch, *Courts Are Recognizing Claims for Hostile Work Environment Under ADA*, ANDREWS EMP. LITIG. REP., Mar. 24, 1998, at 3 (discussing disability harassment claims based on hostile environment); Frank S. Ravitch, *Beyond Reasonable Accommodation: The Availability and Structure of a Cause of Action for Workplace Harassment Under the Americans with Disabilities Act*, 15 CARDOZO L. REV. 1475, 1476 (1994) (suggesting adaptations of Title VII hostile environment standards for disability harassment cases); Susan Stefan, *"You'd Have to Be Crazy to Work Here": Worker Stress, the Abusive Workplace, and Title I of the ADA*, 31 LOY. L.A. L. REV. 795, 896-99 (1998) (collecting cases involving abusive workplaces); Christine Neagle, Comment, *An Analysis of the Applicability of Hostile Work Environment Liability to the ADA*, 3 U. PA. J. LAB. & EMP. L. 715, 717-25, 737 (2001) (discussing case law and evaluating Ravitch's approach); *see also* Mark C. Weber, *The Americans with Disabilities Act and Employment: A Non-Retrospective*, 52 ALA. L. REV. 375, 398-406 (2000) (discussing disability harassment claims). Other works, including some of mine, discuss disability harassment in elementary and secondary education. *See* Weber, *School Harassment*, *supra* note 3; *see also* Adam A. Milani, *Harassing Speech in the Public Schools: The Validity Of Schools' Regulation of Fighting Words*

project tries to make is to take the study of harassment past the comparison to Title VII, and to tie it more closely to the growing scholarly movement that applies a minority group model to discrimination against people with disabilities.[16] My project attempts to develop the law reform implications of using the minority group approach.

The minority group model stresses the fact that disabling conditions do not necessarily disable, were it not for the human-created environment in which persons with disabilities find themselves: one in which physical, legal, and attitudinal barriers keep them from mobility, from employment opportunities, and from social interaction.[17] Some writing, including some of my own, has challenged various aspects of this minority group or civil rights-integrationist model,[18] but this Article operates within the model's framework.

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and the Consequences If They Do Not, 28 AKRON L. REV. 187, 232-35 (1995) (discussing claims for hostile environment under 29 U.S.C. § 794). For a valuable discussion of common law and other state law remedies for disability harassment, see Ravitch, *supra*, at 1496-98. For a discussion of common law remedies for disability harassment of public school students, see Weber, *School Harassment*, *supra* note 3, at 1119-23.

16. *See* Michelle Fine & Adrienne Asch, *Disability Beyond Stigma: Social Interaction, Discrimination, and Activism*, 44 J. SOC. ISSUES 3, 6-14 (1988) (developing minority group model of people with disabilities); Harlan Hahn, *Advertising the Acceptably Employable Image: Disability and Capitalism*, *in* THE DISABILITY STUDIES READER 172, 174 (Lennard J. Davis ed., 1997) (describing "the minority-group model of disability"); *see also* JAMES I. CHARLTON, NOTHING ABOUT US WITHOUT US: DISABILITY OPPRESSION AND EMPOWERMENT 127 (1998) (defending the continued importance of the minority group-civil rights model of disability); SIMI LINTON, CLAIMING DISABILITY 9-17 (1998) (describing oppression against people with disabilities); Jacobus tenBroek & Floyd W. Matson, *The Disabled and the Law of Welfare*, 54 CAL. L. REV. 809, 814-15 (1966) (applying a civil rights approach to disability); Jonathan C. Drimmer, Comment, *Cripples, Overcomers, and Civil Rights: Tracing the Evolution of Federal Legislation and Social Policy for People with Disabilities*, 40 UCLA L. REV. 1341, 1355-59 (1993) (describing the civil rights model of disability). *See generally* Paula E. Berg, *Ill/legal: Interrogating the Meaning and Function of the Category of Disability in Antidiscrimination Law*, 18 YALE L. & POL'Y REV. 1, 9 (1999). Berg explains that:

> This social-political model rejects the premise of the moral and biomedical perspectives that disability is inherent within the individual. . . . [I]t understands disability as contextual and relational . . . as a broader social construct reflecting society's dominant ideology and cultural assumptions. While it acknowledges the existence of biologically based differences, the social-political model locates the meaning of those differences—and the individual's experience of them as burdensome—in society's stigmatizing attitudes and biased structures rather than in the individual.

Id. (footnotes omitted).

17. *See, e.g.*, Drimmer, *supra* note 16, at 1355 (describing the civil rights model as based on the idea that "the barriers facing the disabled community do not result solely from physical limitations, but from social standards created by an ablist society, from historic oversight of the disabled population, and from the fears and prejudice from centuries of discrimination") (footnote omitted).

18. *See, e.g.*, Marta Russell, *Backlash, the Political Economy, and Structural Exclusion*, 21 BERKELEY J. EMP. & LAB. L. 335, 336 (2000) (criticizing liberal policy assumptions behind

Part I of this Article describes the segregation of people with disabilities, its roots in eugenicist thinking, and the legal response that the ADA makes to it.[19] Part II details the role that harassment plays in furthering segregation despite the presence of the ADA.[20] Part III looks at the ADA and other legal remedies for harassment, considering their uses and limits.[21] Part IV explores potential legal remedies, notably 42 U.S.C. § 12203(b) for workplace cases and the reform of the exhaustion doctrine in educational cases.[22] Part V suggests several measures apart from anti-harassment law that would promote integration of people with disabilities into mainstream society.[23] Finally, Part VI raises the idea of trying to reform society at large to make full integration a reality.[24]

I. SEGREGATION, ITS HISTORY, AND THE ADA'S RESPONSE

The recent history of society's treatment of people with disabilities is a progression from forced separation toward integration into the population as a whole.[25] People with disabilities have moved from isolation to admixture, while remaining members of a large[26] and diverse[27] minority group.[28] The bad old days of segregation were in-

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the ADA); Bonnie Poitras Tucker, *The ADA's Revolving Door: Inherent Flaws in the Civil Rights Paradigm*, 62 OHIO ST. L.J. 335, 341 (2001) (noting limits on the civil rights approach as embodied in the ADA); Mark C. Weber, *Disability and the Law of Welfare: A Post-Integrationist Examination*, 2000 U. ILL. L. REV. 889, 912-19 (suggesting the need for post-integrationist approach to disability theory).

19. *See infra* notes 25-108 and accompanying text.

20. *See infra* notes 109-152 and accompanying text.

21. *See infra* notes 153-198 and accompanying text.

22. *See infra* notes 199-235 and accompanying text.

23. *See infra* notes 236-269 and accompanying text.

24. *See infra* notes 270-274 and accompanying text.

25. *See* tenBroek & Matson, *supra* note 16, at 814-16 (noting the gradual movement away from custodial attitudes toward an integrative approach).

26. How large is a matter of both definition and debate. The Supreme Court used the congressional estimate of 43 million disabled Americans found in the ADA to justify a narrow reading of the statutory definition for persons protected by the statute. Sutton v. United Air Lines, Inc., 527 U.S. 471, 484 (1999) (ruling that "protected group" excludes persons for whom measures such as appliances and medication mitigate substantial limits on major life activities); *see also* Murphy v. United Parcel Serv., Inc., 527 U.S. 516, 521 (1999) (citing *Sutton*, *supra*).

27. *See* Samuel R. Bagenstos, *Subordination, Stigma and "Disability,"* 86 VA. L. REV. 397, 466-84 (2000) (discussing socio-economic, educational, and physical differences in the larger group of disabled persons); *see also Sutton*, 527 U.S. at 494 (Ginsburg, J., concurring) (noting diversity of people with disabilities); H. Stephen Kaye, *Disability Watch: The Status of People with Disabilities in the United States*, Disability Rights Advocates, *at* http://www.dralegal.org/publications/dw (last visited Oct. 3, 2003).

28. *See* Bagenstos, *supra* note 27, at 418 (describing disability as a "subordinated group status"); Drimmer, *supra* note 16, at 1355-56 (describing the civil rights model).

deed bad. Individuals with disabilities were locked away in institutions because they were seen as threats to the well-being of the population as a whole.[29] The ideology of eugenics called for their exclusion from "normal" society, and sometimes for their elimination altogether.[30] The brave new days of legally protected integration are better, but still not fully satisfactory. Much forced separation remains, and people with disabilities feel the ill effects.[31]

A. Then

Society first confined people with disabilities in almshouses, and then in institutions.[32] Alone and ignored, people with disabling conditions experienced life in a Hobbesian state of nature: an existence, "solitary, poor[ ], nasty, brutish, and short."[33] Even those who escaped institutionalization were not necessarily free from legal constraint. Until 1973, Chicago prohibited persons who were "deformed" and "unsightly" from exposing themselves to public view.[34] In many

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29. *See infra* notes 32-37 and accompanying text.

30. *See infra* notes 38-44 and accompanying text.

31. *See infra* notes 51-73 and accompanying text.

32. *See* tenBroek & Matson, *supra* note 16, at 811-16 (describing use of almshouses for custody of persons with disabilities, followed by use of institutions); *see also* Colin Barnes & Mike Oliver, *Disability: A Sociological Phenomenon Ignored by Sociologists*, *available at* http://www.leeds.ac.uk/disability-studies/archiveuk/Barnes/soc%20phenomenon.pdf ("[D]isabled people . . . were segregated from mainstream economic and social life and incarcerated into a variety of institutions, including special schools, asylums, workhouses, and long-stay hospitals created specifically for this purpose.").

33. THOMAS HOBBES, LEVIATHAN 97 (Oxford Univ. Press 1958) (1651); *see* Wyatt v. Aderholt, 503 F.2d 1305, 1310 (5th Cir. 1974) (describing filth, brutality, and malnutrition at a state institution for people with mental retardation); N.Y. State Ass'n for Retarded Children, Inc. v. Rockefeller, 357 F. Supp. 752, 756-57 (E.D.N.Y. 1973) (describing reports of 1300 injuries, assaults, or fights in eight months at state institution for children with mental retardation). Legal protections for institutionalized persons with disabilities were long in coming and often inadequate when they arrived. The constitutional doctrine protecting the safety, habilitation, and medical rights of persons with disabilities in institutions developed after those rights had been extended to people in prison; in fact, the reasoning in the seminal case was that persons involuntarily confined without having committed a crime should not be denied protections afforded convicts. Youngberg v. Romeo, 457 U.S. 307, 315-16 (1982). Many courts refused to find rights to safety and habilitation when an individual was voluntarily confined rather than civilly committed. *See, e.g.*, Fialkowski v. Greenwich Home for Children, Inc., 921 F.2d 459, 464-67 (3d Cir. 1990). The Supreme Court further ruled that basic statutory protections of institutionalized persons with disabilities were unenforceable. Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 31-32 (1981).

34. *See* Martha T. McCluskey, Note, *Rethinking Equality and Difference: Disability Discrimination in Public Transportation*, 97 YALE L.J. 863, 863 n.8 (1988) (citing Chicago Code § 36-34 (1966) (repealed 1973)); *see also* Note, *Facial Discrimination: Extending Handicap Law to Employment Discrimination on the Basis of Physical Appearance*, 100 HARV. L. REV. 2035, 2035 n.2 (1987) (collecting examples of municipal "ugly laws").

places, the law excluded children with disabilities from public school.[35] One statute imposed criminal penalties on parents if they persisted in a demand for public school placement.[36] In 1975, when federal legislation finally required states receiving federal educational funds to serve all school-aged children with disabilities, 1.75 million children were not receiving any schooling, and an estimated 2.5 million were in programs that did not meet their needs.[37]

Eugenics, the pseudo-science of producing an optimal human population, furnished an ideology that justified the exclusion of the physically and mentally "unfit" from social life, through confinement, sterilization, and even outright killing.[38] Courts operating under the influence of this ideology approved the compelled sterilization of individuals on specious assertions that they had a propensity to pass disabilities on to their offspring.[39] Public officials declared that people with disabilities had to be kept from mingling with others.[40] In the 1930s, the German government went even further by initiating a pro-

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35. *See, e.g.*, Dep't of Pub. Welfare v. Haas, 154 N.E.2d 265, 270 (Ill. 1958) (holding that the state is not required to provide education for mentally deficient children); Watson v. City of Cambridge, 32 N.E. 864, 864-65 (Mass. 1893) (entrusting to a school committee the decision of whether a student's disability was so disruptive as to justify expulsion); State *ex rel.* Beattie v. Bd. of Educ., 172 N.W. 153, 154-55 (Wis. 1919) (allowing schools to exclude students whose presence was "harmful to the school and to the pupils," unless the decision was unreasonable). Statutes permitting administrative exclusion of children with disabilities from public school are collected and described in Richard C. Handel, *The Role of the Advocate in Securing the Handicapped Child's Right to an Effective Minimal Education*, 36 OHIO ST. L.J. 349, 351-52 (1975).

36. *See* Handel, *supra* note 35, at 35 (citing Act of May 18, 1965, N.C. Gen. Stat. § 115-65 (1966) and N.C. Gen. Stat. § 115-65 (Supp. 1974)).

37. *See* H.R. REP. No. 94-332, at 11-13 (1975).

38. *See* Weber, *supra* note 18, at 900-01 (discussing effects of eugenics).

39. *See* Buck v. Bell, 274 U.S. 200, 207 (1927) (upholding sterilization of a woman deemed feeble minded, and asserting that "[t]hree generations of imbeciles are enough."). *Buck* itself was a sham case in which the attorney for Carrie Buck was in league with the eugenicists. *See* Paul A. Lombardo, *Three Generations, No Imbeciles: New Light on* Buck v. Bell, 60 N.Y.U. L. REV. 30, 56 (1985). Attitudes underlying the case have not gone away. *See* Roberta Cepko, *Involuntary Sterilization of Mentally Disabled Women*, 8 BERKELEY WOMEN'S L.J. 122, 123 (1993) (describing existing legal procedures for compulsory sterilization that fail to protect rights of women with mental disabilities); Robert L. Hayman, Jr., *Presumptions of Justice: Law, Politics, and the Mentally Retarded Parent*, 103 HARV. L. REV. 1202, 1203 (1990) (challenging prevalent presumption that persons with mental retardation are unfit as parents).

40. *See* Timothy M. Cook, *The Americans with Disabilities Act: The Move to Integration*, 64 TEMP. L. REV. 393, 400-01 (1991) ("In virtually every state, in inexorable fashion, people with disabilities—especially children and youth—were declared by state lawmaking bodies to be 'unfitted for companionship with other children,' a 'blight on mankind' whose very presence in the community was 'detrimental to normal' children, and whose 'mingling . . . with society' was 'a most baneful evil.'") (footnotes omitted) (quoting statutes and governmental reports).

gram involving the systematic killing of individuals with disabilities, which the Nazi government termed "euthanasia."[41] In the United States and elsewhere, infants with disabilities were often denied medical treatment in hospitals and left to die,[42] or were killed outright.[43] As late as the 1940s, American medical experts defended the practice of killing people with disabling conditions, citing the benefits to the rest of the population.[44]

Justice Thurgood Marshall exposed the history of legally enforced segregation of people with developmental disabilities in his partial dissent in *City of Cleburne v. Cleburne Living Center, Inc.*[45] He began by discussing eugenics and the ideology of segregation:

> [T]he mentally retarded have been subject to a "lengthy and tragic history" . . . of segregation and discrimination that can only be called grotesque. During much of the 19th century, mental retardation was viewed as neither curable nor dangerous and the retarded were largely left to their own devices. By the latter part of the century and during the first decades of the new one, however, social views of the retarded underwent a radical transformation. Fueled by the rising tide of Social Darwinism, the "science" of eugenics, and the extreme xenophobia of those years, leading medical authorities and others began to portray the "feeble-minded" as a "menace to society and civilization . . . responsible in a large degree for many, if not all, of our social problems."[46]

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41. Hugh Gregory Gallagher, *"Slapping Up Spastics": The Persistence of Social Attitudes Toward People with Disabilities*, 10 ISSUES L. & MED. 401, 402 (1995) ("In the late 1930s and throughout World War II, physicians of Germany's medical establishment . . . systematically killed their severely disabled and chronically mentally ill patients. . . . The officially sanctioned killing program was authorized by Hitler in 1939 at the request of leading figures of the German medical establishment. . . . The program's proponents advanced various arguments for its justification: compassion, eugenics, economics, racial purity."); Stanley S. Herr, *The International Significance of Disability Rights*, 93 AM. SOC'Y INT'L L. PROC. 332, 332 (2000) ("By the 1930s . . . the killing of German and Austrian nationals with disabilities through so-called euthanasia programs, suggested precursors to the genocide and fascist barbarisms to come.").

42. This practice continued at least into the 1930s. *See* Cook, *supra* note 40, at 403 n.74 (collecting extensive primary sources).

43. In his autobiography, Oliver Sacks records the practice of the matron under his physician mother's supervision drowning newborns with anencephaly, spina bifida, or other birth defects. OLIVER SACKS, UNCLE TUNGSTEN 240-41 (2001).

44. *See* Cook, *supra* note 40, at 403 n.74 (citing a 1942 article that proposed "euthanasia for hopelessly mentally defective individuals").

45. 473 U.S. 432, 461-62 (1985) (Marshall, J., concurring in part and dissenting in part).

46. *Id.* at 461-62 (citations and footnotes omitted) (quoting, in first sentence, Univ. of Cal. Regents v. Bakke, 438 U.S. 265, 303 (1978) (plurality opinion) and in last sentence, H. Goddard, *The Possibilities of Research as Applied to the Prevention of Feeblemindedness*, PROC.

This ideology had very real consequences for the individuals with disabilities that the authorities sought to isolate from the general population:

> A regime of state-mandated segregation and degradation soon emerged that in its virulence and bigotry rivaled, and indeed paralleled, the worst excesses of Jim Crow. Massive custodial institutions were built to warehouse the retarded for life; the aim was to halt reproduction of the retarded and "nearly extinguish their race." Retarded children were categorically excluded from public schools, based on the false stereotype that all were ineducable and on the purported need to protect nonretarded children from them. State laws deemed the retarded "unfit for citizenship."[47]

The technology of the industrial revolution reinforced the segregation that the era's "the race is to the swift"[48] ideology supported. Industrial production techniques fostered segregation by splitting the tasks involved in production among workers, and by eliminating workers who could not keep up with machines or other workers in the same production process.[49] "Industrialization brought policies that segregated disabled people, removing them from their indigenous communities, placing many of them in institutions . . . ."[50]

NAT'L CONF. CHARITIES & CORRECTION 307 (1915)). As Justice Marshall pointed out, people with developmental disabilities were viewed as a threat to society, as were African-Americans:

> Books with titles such as "The Menace of the Feeble Minded in Connecticut" (1915), issued by the Connecticut School for Imbeciles, became commonplace. See C. Frazier, (Chairman, Executive Committee of Public Charities Assn. of Pennsylvania), The Menace of the Feeble-Minded In Pennsylvania (1913); W. Fernald, The Burden of Feeble-Mindedness (1912) (Mass.); Juvenile Protection Association of Cincinnati, The Feeble-Minded, Or the Hub to Our Wheel of Vice (1915) (Ohio). The resemblance to such works as R. Shufeldt, The Negro: A Menace to American Civilization (1907), is striking, and not coincidental.

Id. at 462 n.8.

47. *Id.* at 462-63 (footnotes omitted) (quoting, in second sentence, A. MOORE, THE FEEBLE-MINDED IN NEW YORK 3 (1911), in last sentence, Act. of Apr. 3, 1920, ch. 210, § 17, 1920 MISS. LAWS 288, 294). *See generally* Anita Silvers & Michael Ashley Stein, *Disability, Equal Protection, and the Supreme Court: Standing at the Crossroads of Progressive and Retrogressive Logic in Constitutional Classification*, 35 U. MICH. J.L. REFORM 81, 109 (2001-02) ("Marshall's partial dissent [in *Cleburne*] took the history of oppression of disabled people to be a lens that inexorably distorted assessments of their differences.").

48. John Davidson (1857-1909), *War Song*, *available at* http://www.theotherpages.org/poems/2001/davidson0102.html (last visited Aug. 18, 2003).

49. *See* Hahn, *supra* note 16, at 177 (stating that factories were designed to accommodate nondisabled workers).

50. *See* Richard K. Scotch, *American Disability Policy in the Twentieth Century*, *in* THE NEW DISABILITY HISTORY 375, 389 (Paul K. Longmore & Lauri Umansky eds., 2001).

B. Now

The attitudes remain, and in more than vestigial form. In a speech just a few years ago, the President of Boston University referred to students with learning disabilities as a "plague."[51] In the late 1980s, the judge in the trial of the tort action over birth defects attributed to the drug Bendectin excluded all plaintiffs with visible deformities from the courtroom on the ground that their appearance would improperly influence the jury.[52] The legislative history of the Americans with Disabilities Act reports an instance in which children with Down's syndrome were kept out of a private zoo on the belief that their appearance would bother the animals.[53] Employers have denied jobs to people with cerebral palsy[54] and arthritis[55] because of the supposed discomfort that co-workers or customers would experience from looking at them. Disability rights activists have felt compelled to array themselves against Peter Singer, the Princeton philosopher who argues that the killing of infants with severe disabilities is consistent with principles of morality.[56]

Current economic conditions do not necessarily help foster integration and replace segregationist attitudes with more progressive ones. Post-industrial techniques have, at best, an equivocal effect. The movement toward high technology in many jobs should make them easier to perform by people with mobility impairments and

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51. *See* Guckenberger v. Boston Univ., 957 F. Supp. 306, 312 (D. Mass. 1997). Note that President Jon Westling was using the term "plague" to describe the students, not the condition.

52. *See In re* Bendectin Litig., 857 F.2d 290, 296 (6th Cir. 1988). Not all judges share this attitude. *See, e.g.*, Helminski v. Ayerst Labs., 766 F.2d 208, 216-17 (6th Cir. 1985) (holding that litigants with physical abnormalities should not be discriminated against with respect to presence in court).

53. *See* H.R. REP. NO. 101-485, pt. 2, at 30 (1990).

54. *See* 135 CONG. REC. S4994 (daily ed. May 9, 1989) (statement of Sen. Durenberger) (reporting the experiences of two of the Senator's constituents who were denied jobs for which they were qualified because "fellow employees would not be comfortable working with a person with a disability," and because the director believed "handicapped persons . . . were difficult to work with").

55. *See* H.R. REP. NO. 101-485 (discussing a similar case where a woman was denied a position at a college because administrators believed that "normal students shouldn't see her").

56. *See, e.g.*, Harriet McBryde Johnson, *Unspeakable Conversations: or How I Spent One Day as a Token Cripple at Princeton University*, N.Y. TIMES, Feb. 16, 2003, § 6, at 50 (describing the passionately negative reaction to Singer among members of disability rights community). Singer articulates his views on infanticide in a number of texts. *See, e.g.*, HELGA KUHSE & PETER SINGER, SHOULD THE BABY LIVE?: THE PROBLEM OF HANDICAPPED INFANTS 189-97 (1985) (asserting that killing infants with disabilities is moral); PETER SINGER, ANIMAL LIBERATION 18 (2d ed. 1990) (equating the killing of animals to the killing of infants with brain damage).

some other physical disabilities.[57] The barriers to employment for some people with sensory impairments may also diminish as technological devices enhance communication.[58] Nevertheless, the movement toward more technological jobs may further decrease the opportunities available to workers with mental retardation and other developmental disabilities, or may result in the shunting of those workers to an ever greater degree into low-level jobs in maintenance and landscaping.[59] Machines increasingly are doing the repetitive production activities that were once the province of specialized workshops for individuals with developmental disabilities.[60]

Architectural, communication, and other barriers in the environment also continue to contribute to the segregation of people with disabilities.[61] If barriers prevent individuals from riding the bus, entering stores, restaurants, and government buildings, or making use of places of public entertainment, people with impairments will remain invisible, hidden out of sight.[62]

Segregation strengthens the negative attitudes that led to enforced separation in the first place.[63] Gordon Allport's classic study of

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57. *See* Al Cavalier, *The Application of Technology in the Classroom and Workplace: Unvoiced Premises and Ethical Issues, in* IMAGES OF THE DISABLED, DISABLING IMAGES 129, 130-33 (Alan Gartner & Tom Joe eds., 1987) (discussing technological advancements that may be beneficial to individuals with disabilities in the workplace).

58. *See id.* at 130-31 (describing devices that assist individuals with hearing impairments).

59. *Cf.* Harlan Hahn, *Toward a Politics of Disability: Definitions, Disciplines, and Policies*, 22 SOC. SCI. J. 87, 91 (1985) (focusing on the possible integration of persons with physical disabilities through computers and labor saving devices); Cavalier, *supra* note 57, at 130-33 (discussing the impact of technology for individuals with physical, but not mental, disabilities).

60. This development is not necessarily bad, for specialized or sheltered workshops that segregate workers with disabilities and frequently provide little in the way of an entry point to better paying, better integrated work. *See* Harlan Hahn, *Towards A Politics of Disability*, Institute on Independent Living, at http://www.independentliving.org/docs4/hahn2.html (last visited Mar. 10, 2003) ("[D]isabled persons often are trained by rehabilitation programs for positions in the secondary labor market which provide few opportunities for increase[d] income or upward mobility."). Nevertheless, if jobs that people with developmental disabilities can do are not available in other settings, the result of the substitution of machines is a net loss in employment.

61. *See* Simon Ungar, *Disability and the Built Environment*, Distance Education Centre, University of Sheffield, *at* http://fhis.gcal.ac.uk/PSY/sun/LectureNotes/city/city.html (last visited Mar. 10, 2003) (cataloging physical and sensory barriers in the environment and the effects of isolating persons with disabilities).

62. Hahn, *supra* note 60, at 94 ("Disabled citizens have confronted barriers in architecture, transportation, and public accommodations which have excluded them from common social, economic, and political activities even more effectively than the segregationist policies of racist governments.").

63. *See* Ungar, *supra* note 61 ("[I]t should also be clear that these exclusions themselves help to reproduce negative attitudes to disabled people.").

the social psychology of prejudice concluded that individuals without contact with members of a racial or other out-group typically hold members of the minority in low esteem.[64] Casual contact may simply reinforce the stereotypes, because members of the majority group unconsciously seek out information that confirms their pre-existing views.[65] Nevertheless, prejudice declines substantially when casual contact gives way to closer acquaintance,[66] and especially, to engagement in activity as equals in pursuit of a common goal.[67] As Martha Field has observed, "One reason many people are so fearful of—even repulsed by—persons with handicaps . . . is that they have never known such persons and have not seen them functioning in the community."[68] Harlan Hahn, a political scientist who is a noted scholar of disability issues, attributes the desire to segregate to the repugnance toward disabled bodies and the fear of someday being disabled.[69] This anxiety flourishes when people without disabilities lack any real experience as an equal—as co-workers, classmates, or daily acquaintances—with people who have disabilities.[70] Research confirms that school children with disabilities, who, as noted below, are pervasively segregated from other children,[71] are vastly lower in social prestige than the other students.[72] Samuel Bagenstos combines the environmental model of disability, *i.e.*, that disability is located in the social and physical environment that fails to adapt to persons with impairments, with ideas about the subordination that society imposes, and

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64. GORDON W. ALLPORT, THE NATURE OF PREJUDICE 264 (1954).

65. *Id.*

66. *Id.* at 268.

67. *Id.* at 276-78.

68. Martha A. Field, *Killing "the Handicapped"—Before and After Birth*, 16 HARV. WOMEN'S L.J. 79, 117 (1993).

69. *See* Michael Ashley Stein, *Disability, Employment Policy, and the Supreme Court*, 55 STAN. L. REV. 607, 631-32 (2002) ("Harlan Hahn . . . asserts that able-bodied society feels 'existential anxiety' towards the disabled."). The combination of repugnance to disabled bodily difference and fear of also attaining such variation in the future, according to Hahn, result in a sociological desire to segregate people with disabilities from the mainstream." Stein, *supra*, at 632; *see also* David M. Engel, *Law, Culture, and Children with Disabilities: Educational Rights and the Construction of Difference*, 1991 DUKE L.J. 166, 183-84 (discussing psychological origins of negative attitudes toward persons with disabilities).

70. Several years before the passage of the ADA, the United States Civil Rights Commission linked forced separation and the negative attitudes that lead to discrimination: "Historically, society has tended to isolate and segregate handicapped people. Despite some improvements, particularly in the last two decades, discrimination against handicapped persons continues to be a serious and pervasive social problem." U.S. COMM'N ON CIVIL RIGHTS, ACCOMMODATING THE SPECTRUM OF INDIVIDUAL ABILITIES 159 (1983).

71. *See infra* text accompanying notes 95-98 (describing segregated educational settings for children with disabilities).

72. *See* Paul Sale & Doris M. Carey, *The Sociometric Status of Students with Disabilities in a Full-Inclusion School*, 62 EXCEPTIONAL CHILDREN 6, 16-17 (1995) (reporting attitude study).

concludes that the stigma society attaches to disability is disability's defining characteristic.[73]

C. *The Goal of Integration in the ADA*

Just as segregation feeds on itself by constantly reinforcing the fear of the unknown, carefully structured integration creates positive attitudes. Dick Thornburgh, the Attorney General at the time of the adoption of the ADA, commented: "Attitudes can only be reshaped gradually. One of the keys to this reshaping process is to increase contact between and among people with disabilities and their more able-bodied peers."[74] Psychological studies support Thornburgh's point. Timothy Cook, a legendary disability rights advocate, surveyed the literature and declared: "The research data shows, without doubt, what should be obvious, that prejudice is lessened through integration."[75]

The ADA is a thoroughly integrationist statute.[76] The second of the nine findings in the preamble to the ADA states that "historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive problem."[77] Cook wrote that the "findings make it as plain as it could be that the primary evil addressed in the ADA was the segregation that continues to impose an isolated, denigrated existence upon persons with disabilities."[78] The Senate Report on the bill that became the ADA declared that "[o]ne of the most debilitating forms of discrimination is segregation imposed by others . . . ."[79] Senator Kennedy, who was instrumental in the passage of the law, averred: "The Americans with Disabilities Act will end this American apartheid. It

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73. Bagenstos, *supra* note 27, at 438-39.

74. *Americans with Disabilities Act of 1989: Hearing on S. 2345 Before the Senate Comm. on Labor and Human Resources, Subcomm. on the Handicapped*, 101st Cong. 202 (1989). Congressional leaders agreed with this proposition. *See* 136 CONG. REC. H2603 (daily ed. May 22, 1990) (statement of Rep. Collins) ("If we have learned any lessons in the last 30 years, it is that only by breaking down barriers between people can we dispel the negative attitudes and myths that are the main currency of oppression.").

75. *Cook*, *supra* note 40, at 441 (discussing studies showing that integration improves attitudes).

76. For a more elaborate development of this characterization, see Weber, *supra* note 18, at 903.

77. 42 U.S.C. § 12101(a)(2) (2000).

78. Cook, *supra* note 40, at 398; *see also id.* at 419 ("First and foremost, Congress expressed in the ADA its determination that 'segregation,' 'isolation,' and 'institutionalization' of persons with disabilities were 'forms of discrimination' to be disestablished.") (footnotes omitted) (quoting ADA Title II provisions).

79. S. REP. NO. 101-116, at 6 (1989).

will roll back the unthinking and unacceptable practices by which disabled Americans today are segregated, excluded, and fenced off from fair participation in our society . . . ."[80] Provisions of the Act prohibit segregation in employment,[81] public services,[82] and public accommodations.[83]

The Supreme Court's decision in *Olmstead v. L.C. ex rel. Zimring*[84] shows the primacy of integration as an ADA goal, and the link between exclusion and discrimination. However, it also demonstrates the limits of the ADA as a means to reaching the goal of integration. In *Olmstead*, two women with mental retardation and mental illness lived for long periods of time in institutionalized settings despite the conclusion of treating professionals that they could be served in community-based residential programs, where they would have more freedom and could be more closely integrated into society.[85] The Court upheld a regulation issued pursuant to the authority granted in the ADA, which provides that public entities must administer services and programs in the most integrated setting appropriate to the needs of people with disabilities.[86] The Court found that "[u]njustified isolation . . . is properly regarded as discrimination based on disability."[87] The Court, however, also ruled that, in implementing the regulation, the courts must consider, in view of the resources available to the state, not only the cost of providing community-based care to the individuals making the claim, but also the range of services the state provides to others with mental disabilities, and the state's obligation to provide equal services to all.[88] The Court revealed its anxiety over the financial problems states may have in maintaining institutions for individuals who require intensive care while paying for community-based placements for others.[89] The Court also explicitly approved waiting lists, as long as they move "at a reasonable pace."[90] The Court's deci-

80. 135 CONG. REC. S4993 (daily ed. May 9, 1989).

81. 42 U.S.C. § 12112(b)(1) (2000).

82. *See* 28 C.F.R. § 35.130(d) (2002). Title II's substantive provisions, apart from a general prohibition on discrimination, 42 U.S.C. § 12132 (2000), are found in regulations authorized by 42 U.S.C. § 12134(a)-(b) (2000).

83. 42 U.S.C. § 12182(b)(iii)-(iv) (2000).

84. 527 U.S. 581 (1999).

85. *Id.* at 593-94.

86. *Id.* at 597 (upholding 28 C.F.R. § 35.130(d)).

87. *Id.*

88. *Id.* at 604 (applying "fundamental-alteration" defense provided by 28 C.F.R. § 35.130(b)(7)).

89. *See id.* (stating that "the ADA is not reasonably read to impel States to phase out institutions, placing patients in need of close care at risk.").

90. *Id.* at 606.

sion echoed *Brown v. Board of Education II*[91] in its subordination of the integration ideal to the supposed needs of governments engaged in illegal segregation.[92]

Lower court case law displays an even greater ambivalence toward integration. Some courts have upheld integration claims. In *Caruso v. Blockbuster-Sony Music Entertainment Centre*,[93] the Court of Appeals for the Third Circuit required that a lawn area outside a concert arena be made accessible to wheelchair users, citing the obligation to provide public accommodations in the most integrated setting appropriate to the needs of the individual.[94] Other courts, however, have denied demands for integration. *McLaughlin v. Holt Public Schools Board of Education*[95] is one of many cases rejecting the proposition that a child with disabilities should be educated at a school in the child's neighborhood, favoring instead the school system's preference to provide services at a concentrated site with fewer opportunities for mixing with children without disabilities.[96] *Tyler v. Ispat Inland Inc.*[97] upheld an employer's decision to separate an employee with mental illness from his original worksite and place him in a new location, despite his claim that the separation from the original site segregated him on account of his disability.[98]

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91. 349 U.S. 294, 301 (1955) (allowing delay in implementation of racial integration in public schools for administrative difficulties and stating that integration was to be implemented "with all deliberate speed").

92. Cook collected studies supporting his contention that "virtually all people with disabilities can and should live and receive services they need in community settings." Cook, *supra* note 40, at 442, 442-445 (citing numerous studies demonstrating that individuals with disabilities can live successfully in integrated settings). The array of authority supporting this contention is indeed overwhelming. Institutions remain open primarily because of politics. State hospitals provide badly needed jobs and other patronage to the small towns in which they are located. Needless to say, political considerations should not establish a defense to deinstitutionalization.

93. 193 F.3d 730 (3d Cir. 1999).

94. *Id.* at 732.

95. 320 F.3d 663 (6th Cir. 2003).

96. *See id.* at 673-74; *see also* Thomas v. Cincinnati Bd. of Educ., 918 F.2d 618 (6th Cir. 1990); DeVries v. Fairfax County Sch. Bd., 882 F.2d 876 (4th Cir. 1989). Courts have generally failed to enforce the regulation providing that the placement of a child with disabilities must be "as close as possible to the child's home." 34 C.F.R. § 300.552(a)(3) (2003); *see, e.g.*, Murray v. Montrose County Sch. Dist. RE-1J, 51 F.3d 921, 929-30 (10th Cir. 1995). The courts have a mixed record applying the least restrictive environment duty in public school cases. *See* MARK C. WEBER, SPECIAL EDUCATION LAW AND LITIGATION TREATISE 9:3-9:9 (2d ed. 2002) (reviewing cases in which courts assess the least restrictive environment duty).

97. 245 F.3d 969 (7th Cir. 2001).

98. *Id.* at 974. The court opined that the no-segregation rule was satisfied when the worker was moved to a setting that included workers without disabilities. *Id.* at 973-74. Nevertheless, the same court held that an employee with a mental illness had stated an

No comprehensive records are kept on the degree to which individuals with disabilities are segregated or integrated in the workforce, although it is known that work in segregated settings remains a feature of life for many people with disabilities, particularly those with mental retardation.[99] Frequently, the only alternative to sheltered work is no work at all. Large numbers of persons with disabilities are unemployed and, therefore, separated from the world of work altogether. The latest statistics, which unfortunately are somewhat dated, show that 72.2 percent of working-age Americans, who report health conditions or impairments that limit their ability to work, do not have jobs.[100] As the compiler of the statistics notes, "For this group, employment would be the most direct route to greater social integration and fuller participation in mainstream life."[101] Confounding any contrary stereotypes, the vast majority of individuals with disabilities who are unemployed want to work.[102] Unemployment contributes to the high degree of impoverishment among people with disabilities, a poverty rate about three times that of the general population.[103]

ADA claim when he was transferred to a location in which he had to work alone and was forbidden to speak to anyone. Duda v. Bd. of Educ., 133 F.3d 1054, 1059-60 (7th Cir. 1998).

99. *See* L. Scott Muller et al., *Labor-Force Participation and Earnings of SSI Disability Recipients: A Pooled Cross-Sectional Times Series Approach to the Behavior of Individuals*, SOC. SECURITY BULL., Mar. 1, 1996, at 22, 34-36 (discussing prevalence of sheltered and supported employment among recipients of government Supplemental Security Income benefits).

100. *See* Kaye, *supra* note 27. Kaye provides further details:

> Employment rates vary greatly according to the nature and severity of the disability. According to 1994-95 data from the Survey of Income and Program Participation (SIPP), people with mobility impairments are the group least likely to be employed (roughly three-quarters do not have jobs), followed by blind people and those with mental retardation:
>
> —only 22.0% of working-age wheelchair users and 27.5% of cane, crutch, or walker users are employed;
>
> —only 25.5% of people unable to climb stairs, 22.5% of those unable to walk three city blocks, and 27.0% of those unable to lift and carry 10 pounds have jobs;
>
> —30.8% percent of blind people ("unable to see words or letters") work, while 43.7% of those with visual impairment are employed;
>
> —only 35.1% of those with mental retardation have jobs;
>
> —among those with mental or emotional disorders or impairments, 41.3% are employed;
>
> —64.4% of working-age adults with hearing impairments hold jobs, while 59.7% of those "unable to hear normal conversation" are employed.

Id.

101. *Id.*

102. *Id.* ("In a 1994 Harris poll, 79% of those without jobs said that they would prefer to be working.").

103. *See* Mitchell P. LaPlante et al., *Disability Statistics Abstract Number 11: Disability and Employment* (1996), Disability Statistics Center, *available at* http://www.dsc.ucsf.edu/UCSF/

Educational settings manifest separation of children with disabilities, as the *McLaughlin* case exemplifies.[104] In 1998-99, 80.8 percent of children ages 6-11, 72.3 percent of children ages 12-17, and 58.8 percent of children ages 18-21 receiving public special education services were educated outside the general education classroom more than 40 percent of the school day.[105] More than 20 percent of all children with disabilities were in separate environments for over 60 percent of the day.[106] Of children with mental retardation, 51 percent spent 60 percent or more of the day isolated from their nondisabled peers.[107] Many students with disabilities eventually isolate themselves from their classmates in a more permanent fashion: Children with disabilities have dropout rates three times those of other children.[108]

II. THE ROLE OF HARASSMENT IN PERPETUATING SEGREGATION

Harassment is a special case of exclusion. Harassment operates to perpetuate segregation. It prevents people from taking advantage of the right to work, to be educated, or to use public services in an integrated fashion. It induces people to rely on segregated settings in order to obtain respite from mistreatment. Mental and sensory impairments are especially stigmatized,[109] and harassment is particularly effective at keeping those with mental retardation and other mental conditions out of the workplace, out of integrated school settings, and

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pdf/Abstract11.pdf (last visited Oct. 4, 2003) (comparing rates of poverty of 30.0% for working-age persons with work disabilities and 10.2% for those without work disabilities).

104. *See supra* notes 95-96 and accompanying text (discussing *McLaughlin*).

105. U.S. DEP'T OF EDUC., TWENTY-THIRD ANNUAL REPORT TO CONGRESS ON THE IMPLEMENTATION OF THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT III-3 to 5 (2001).

106. *Id.*

107. *Id.* at III-5.

108. U.S. DEP'T OF EDUC., THE TRANSITION EXPERIENCES OF YOUNG PEOPLE WITH DISABILITIES: A SUMMARY OF FINDINGS FROM THE NATIONAL LONGITUDINAL STUDY OF SPECIAL EDUCATION STUDENTS 2-9 (1993).

109. The civil rights model of disability, which faults the human environment for the difficulty of integration, does not apply as easily to problems of discrimination against persons with pervasive developmental disability and other mental disorders, and, therefore, is less effective at overcoming the stigma that attaches to people with those disabilities. One observer notes:

> Scholars in disability studies point out not only that cultural assumptions shape our perceptions of disability but also that social arrangements actually shape what is considered a disability. The availability of services, the structures of buildings, the distribution of income, and many other factors all transform human variation into disability. Scholars have had a harder time applying this model to people with severe intellectual disabilities. It is all too easy to see people with severe disabilities as automatically excluded from society.

Janice A. Brockley, *Martyred Mothers and Merciful Fathers*, *in* THE NEW DISABILITY HISTORY, *supra* note 50, at 293, 294 (footnotes omitted).

generally out of sight and mind.[110] Discussing opinion studies regarding acceptance of people with learning disabilities and mental and sensory impairments, Wendy Wilkinson and Lex Frieden concluded:

> The hierarchy of acceptance depends on the particular type of disability. Individuals with hidden, unfamiliar, or more stigmatized disabilities face greater barriers in the workplace and in society. The unemployment rate among people with psychiatric disabilities is estimated to be 85 percent, significantly higher than the rate for individuals with physical disabilities.[111]

The law rejects the idea of forced separation to keep the subjects of harassment from being harassed. That would truly be a regression to the model of disability that locates the problem in the person with the disability, rather than in the social and physical environment. In *City of Cleburne v. Cleburne Living Center, Inc.*,[112] the Supreme Court rejected the contention that protecting individuals with mental retardation from harassment could constitute a legitimate state interest for purposes of equal protection analysis if the result was the exclusion of the residents from their chosen site for a group home.[113] The Court declared that "denying a permit based on such vague, undifferentiated fears is . . . permitting some portion of the community to validate what would otherwise be an equal protection violation."[114]

Other cases demonstrate how harassment drives people out of integrated employment and mainstreamed educational settings, and illustrate how few of those people receive remedies from the courts, despite the principle that the law should permit individuals to assert their right to an integrated environment. This reality pertains to both work and school.

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110. *See infra* notes 121-125, 141-145, and 180-196.

111. Wendy Wilkinson & Lex Frieden, *Glass-Ceiling Issues in Employment of People with Disabilities*, *in* EMPLOYMENT, DISABILITY, AND THE AMERICANS WITH DISABILITIES ACT 68, 74 (Peter David Blanck ed., 2000) (citations omitted); *see also* Mollie Weighner Marti & Peter David Blanck, *Attitudes, Behavior, and ADA Title I*, *in* EMPLOYMENT, DISABILITY, AND THE AMERICANS WITH DISABILITIES ACT, *supra*, at 358 ("Across broad categories of disabilities, studies have established a fairly uniform hierarchy of reactions to different types of disabilities. Addictive conditions (e.g., alcoholism, drug use), psychological conditions (e.g., mental retardation, mental illness), and neurological conditions (e.g., epilepsy, cerebral palsy) are viewed most negatively . . . .") (citations omitted).

112. 473 U.S. 432 (1985).

113. *Id.* at 446-47.

114. *Id.* at 449; *see also* Campbell v. Talladega County Bd. of Educ., 518 F. Supp. 47, 55 (N.D. Ala. 1981) (rejecting the school board's argument that the child should be sent to a separate school to avoid ridicule, and ordering specialized services for the child).

A. *Work*[115]

Several cases of workplace harassment are illustrative. Roger Lee Statzer had a developmental speech disorder that left his speech about 50 percent intelligible.[116] He alleged, and testimony from his supervisors established, that co-workers at his carpentry and maintenance job routinely ridiculed him.[117] His supervisors knew about the harassment, but failed to testify to anything that they did to stop it.[118] The attitude of his top boss was revealed by his comment to Statzer that "if [he] didn't like the job, [he] could quit."[119] The court rejected Statzer's claim of hostile environment disability harassment, ruling on summary judgment that the constant ridicule was as a matter of law insufficient to meet the standard for a violation of the ADA, and that the supervisors had no responsibility to stop the harassment, though they were fully aware of it.[120]

Ricky Casper had a mental impairment that reduced his ability to learn.[121] Supervisors at his maintenance and assembly job derided him as being stupid, and forced him to work while co-workers laughed at him.[122] He received the nicknames "Rick Retardo" and "dumb ass."[123] A supervisor asked him why he had his job because "you can't read or write or do math."[124] The court granted summary judgment to his employer on the ADA harassment claim, holding that the comments and acts "could not amount to an objectively hostile work environment based on disability."[125]

Marge McConathy was a benefits manager who developed a disorder of the jaw, temporomandibular joint disease, which required her to undergo multiple surgeries.[126] Her supervisor told her that she should not be making such extensive use of her health benefits, told

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115. This topic is developed at length in Weber, *Workplace Harassment Claims*, *supra* note 3.

116. Statzer v. Town of Lebanon, No. 1:00CV00128, 2001 U.S. Dist. LEXIS 7747, at *2 (W.D. Va. June 4, 2001). For this case and the other cases discussed in this section and the next, the assumption is made that the plaintiffs' allegations were true, an assumption the courts made despite reaching their conclusions.

117. *Id.* at *14.

118. *Id.* at *14-15.

119. *Id.* at *2-3 (alteration in original).

120. *Id.* at *15.

121. Casper v. Gunite Corp., No. 3:98-CV-173RM, 1999 U.S. Dist. LEXIS 13554, at *4 (N.D. Ind. June 11, 1999).

122. *Id.* at *14.

123. *Id.*

124. *Id.* at *10.

125. *Id.* at *11.

126. McConathy v. Dr. Pepper/Seven Up Corp., 131 F.3d 558, 560 (5th Cir. 1998) (per curiam).

her staff to stop communicating with her, excluded her from business meetings, and refused to acknowledge her presence when she was with him.[127] Ultimately, she was fired in a reorganization.[128] The court of appeals affirmed summary judgment on her disability harassment claim, finding her allegations insufficient to meet the test of pervasive harassment.[129]

What is remarkable in all these cases is that the workers continued in their jobs (or tried to do so),[130] despite harassment that would drive a reasonable person to quit. Thus, the plaintiffs in these cases stand for the untold numbers of workers who leave integrated job settings in response to campaigns of harassment that their supervisors conduct or do nothing to stop.

B. Education[131]

A representative case regarding public schooling is that of Robert Kubistal, a seventh grader with an undiagnosed visual impairment.[132] His teacher nicknamed him "butthead," and said she wanted to remove his eyes and give them to a student who would work harder.[133] After his mother complained to Robert's principal and the principal told the teacher to apologize, the teacher called Robert before the class, knelt, and in an exaggerated voice said, "I'm so sorry, Bobby!"[134] She then turned to the class and put her finger in her throat to mimic gagging.[135] Sometime later, after the visual impairment was discovered, the principal came to the classroom and built Robert an "isolation chamber"[136] out of movable bookcases. Robert sat in the isolation chamber every day for weeks, even during his lunch period, despite his mother's complaints.[137] Robert finally graduated from grade school, though he had never been assigned eighth grade work.[138] At graduation, the marshal initially left out Robert's name, then looked at Robert's mother, giggled, and said, "Oh, Robert Kubis-

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127. *Id.*
128. *Id.* at 561.
129. *Id.* at 563-64.
130. *Id.* at 561; Statzer v. Town of Lebanon, No. 1:00CV00128, 2001 U.S. Dist. LEXIS 7747, at *3-5 (W.D. Va. June 4, 2001); *Casper*, 1999 U.S. Dist. LEXIS 13554, at *7-10.
131. This topic is developed at length in Weber, *School Harassment*, *supra* note 3.
132. Kubistal v. Hirsch, No. 98 C 3838, 1999 U.S. Dist. LEXIS 1613, at *3-4 (N.D. Ill. Feb. 9, 1999).
133. *Id.* at *3.
134. *Id.*
135. *Id.*
136. *Id.* at *5.
137. *Id.* at *5-6.
138. *Id.* at *7.

tal."[139] Robert developed depression, bed-wetting, and a loss of interest in school from these experiences.[140]

Another case of educational harassment is that of Charlie F., a fourth grader with attention deficit disorder, who had frequent panic attacks.[141] At the end of each week, his teacher held sessions with the class in which she asked the students to vent their feelings.[142] She routinely asked them to talk about Charlie, "and they all too willingly obliged, leading to humiliation, fistfights, mistrust, loss of confidence and self-esteem, and disruption of Charlie's educational progress."[143] When Charlie's parents learned what was happening (the teacher had instructed the students to keep the sessions secret),[144] they moved him to another school, but children from the seventh grade class still harassed him when they saw him on the street.[145]

Both *Kubistal* and *Charlie F.* were dismissed on the ground that the parents bringing suit failed to exhaust administrative remedies under the federal special education law,[146] even though the plaintiffs were seeking damages, a form of relief the administrative decision maker could not provide,[147] and the children were no longer in the schools where the harm took place.[148] In both instances, the ultimate result of the harassment was the child's withdrawal from school, either a loss of interest in school in general, or a physical withdrawal from the school where the harassment occurred.[149] The harassment worked to drive the student with disabilities out of the integrated educational setting.

Disability harassment causes exclusion, and exclusion is the definition of segregation.[150] Scholars of sex discrimination law have recognized a similar connection between sexually harassing behavior and the continued exclusion of women from the male preserves of the workplace, an exclusion that frustrates women's efforts to integrate

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139. *Id.*

140. *Id.* at *8.

141. Charlie F. v. Bd. of Educ., 98 F.3d 989, 990 (7th Cir. 1996). This account is taken from the plaintiffs' allegations reported in the opinion.

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.* at 993 (remanding case with instructions to dismiss); Kubistal v. Hirsch, No. 98 C 3838, 1999 U.S. Dist. LEXIS 1613, at *21 (dismissing the case).

147. *Charlie F.*, 98 F.3d at 991; *Kubistal*, 1999 U.S. Dist. LEXIS 1613, at *18-19.

148. *Charlie F.*, 98 F.3d at 990; *Kubistal*, 1999 U.S. Dist. LEXIS 1613, at *7.

149. *Charlie F.*, 98 F.3d at 990; *Kubistal*, 1999 U.S. Dist. LEXIS 1613, at *8.

150. BLACK'S LAW DICTIONARY 1358 (6th ed. 1990) (defining segregation as "[t]he act or process of separation").

job classifications typically held by males.[151] In one example, a writer describes the steady abuse of female baseball umpires by co-workers as a generally successful effort to keep women out of the job category, and criticizes courts for ignoring the role of historical exclusion in evaluating legal claims for harassment.[152]

III. CURRENT LEGAL REMEDIES

The law has not been entirely silent on the subject of remedies for workplace and educational harassment of people with disabilities. Causes of action exist, though they are limited in the conduct they cover and broad in the defenses they permit. Therefore the courts are frequently ineffective in compensating for and deterring harassment at work and school.

A. Work

Recently, several courts have upheld a remedy under Title I of the ADA for hostile environment disability harassment. The claims have relied on an analogy to sex and race harassment claims under Title VII. In *Fox v. General Motors Corp.*,[153] the United States Court of Appeals for the Fourth Circuit affirmed judgment on a jury verdict in favor of an auto assembly plant worker whose back injuries were the subject of ridicule and humiliation from supervisors and co-workers.[154] Supervisory personnel blocked efforts at accommodation, at one point placing Fox at a work table that was so low that it made his back condition worse.[155] Fox's emotional distress manifested itself in depression, anxiety, and thoughts of suicide.[156] In sustaining the

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151. *See* Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 YALE L.J. 1683, 1686-87 (1998) (describing nonsexual harassment that operates to discourage women from taking jobs traditionally held by men, and undermines their success in those jobs); *see also* Kathryn Abrams, *The New Jurisprudence of Sexual Harassment*, 83 CORNELL L. REV. 1169, 1205 (1998) (characterizing harassment as a means of perpetuating masculine workplace norms); Katherine M. Franke, *What's Wrong with Sexual Harassment?*, 49 STAN. L. REV. 691, 696 (1997). Franke explains that:

> Sexual harassment also can be understood to enforce gender norms when it is used to keep gender nonconformists in line. For example, women who work in nontraditional jobs, such as the women who worked at the Jacksonville Shipyards, frequently experience extreme sexual harassment from their male coworkers as a way of putting them in their "proper place."

Id. (footnote omitted).

152. Melissa M. Beck, Note, *Fairness on the Field: Amending Title VII to Foster Greater Female Participation in Professional Sports*, 12 CARDOZO ARTS & ENT. L.J. 241, 250-51, 256-64 (1994).

153. 247 F.3d 169 (4th Cir. 2001).

154. *Id.* at 173-74, 181.

155. *Id.* at 173.

156. *Id.* at 174.

claim, the court recognized that like Title VII, the ADA bars discrimination regarding terms, conditions, and privileges of employment.[157] Indeed, Congress enacted the ADA after the Supreme Court had already determined that harassment violates the similar language of Title VII.[158]

Flowers v. Southern Regional Physician Services, Inc.,[159] a Fifth Circuit Court of Appeals case, affirmed the entry of judgment on a jury verdict in favor of an employee with HIV.[160] Once her supervisor learned about the infection, the supervisor shunned Flowers, no longer going to lunch with her or socializing with her, but instead eavesdropping on her.[161] The employer's president would not shake her hand and avoided her.[162] Flowers had to undergo four drug tests in a week, was written up twice and placed on probation, called names, subjected to other petty humiliations,[163] then fired.[164] The Fifth Circuit emphasized the consistency in language and purpose between Title VII and the ADA, finding that the comparison supported a claim for hostile environment disability harassment.[165] It further ruled that the evidence was sufficient to support the jury's verdict for the plaintiff.[166]

The prominence of these cases obscures their atypicality, however. Although Fox, Flowers, and a number of other plaintiffs have succeeded in surviving summary judgment or establishing liability under Title VII-type tests,[167] the vast majority of claims have failed. As

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157. *Id.* at 176.

158. *Id.* at 175-76 (citing Patterson v. McLean Credit Union, 491 U.S. 164, 180 (1989) and Meritor Sav. Bank v. Vinson, 477 U.S. 57, 64-66 (1986)). The court overturned an award of $4000 for unpaid overtime on the ground that it was inconsistent with the jury's finding that General Motors had not intentionally discriminated against the plaintiff. *Id.* at 181. For commentary on this aspect of the decision, see Weber, *Workplace Harassment Claims*, *supra* note 3, at 244 n.26.

159. 247 F.3d 229 (5th Cir. 2001).

160. *Id.* at 231, 239.

161. *Id.* at 236.

162. *Id.* at 237.

163. *Id.*

164. *Id.*

165. *Id.* at 233-34.

166. *Id.* at 236. The court, however, ruled that the plaintiff had not presented adequate evidence of a specific emotional injury, and vacated the damages award, remanding for entry of an award of nominal damages. *Id.* at 239. *See generally* Melinda Slusser, Note, Flowers v. Southern Regional Physician Services: *A Step in the Right Direction*, 33 U. TOL. L. REV. 713 (2002) (providing additional information regarding the case, and arguing that *Flowers* was correctly decided).

167. *See* Rohan v. Networks Presentation LLC, 192 F. Supp. 2d 434, 438 (D. Md. 2002) (denying defendant-employer's motion to dismiss); Swatzell v. Southwestern Bell Tel. Co., No. CA 7:00-CV-139-R, 2001 U.S. Dist. LEXIS 17733, at *27 (N.D. Tex. Oct. 31, 2001)

in *Statzer*, *Casper*, and *McConathy*, courts typically have ruled that the harassment was not sufficiently severe or pervasive under standards established by the Title VII sex and race harassment case law.[168]

(denying defendant-employer's motion for summary judgment); Armstrong v. Reno, 172 F. Supp. 2d 11, 24 (D.D.C. 2001) (denying defendant-employer's motion for summary judgment); Hiller v. Runyon, 95 F. Supp. 2d 1016, 1027 (S.D. Iowa 2000) (denying defendant-employer's motion for summary judgment); Arena v. AGIP USA, Inc., No. 95 CIV. 1529 (WHP), 2000 U.S. Dist. LEXIS 2578, at *21 (S.D.N.Y. Mar. 8, 2000) (denying motion for summary judgment); Disanto v. McGraw-Hill, Inc., No. 97 Civ. 1090 (JGK), 1998 U.S. Dist. LEXIS 12382, at *21 (S.D.N.Y. Aug. 11, 1998) (denying motion for summary judgment); Hendler v. Intelecom USA, Inc., 963 F. Supp. 200, 213 (E.D.N.Y. 1997) (denying defendant-employer's motion for summary judgment); Hudson v. Loretex Corp., No. 95-CV-844 (RSP/RWS), 1997 U.S. Dist. LEXIS 4320, at *20 (N.D.N.Y. Apr. 2, 1997) (denying motion to dismiss); Haysman v. Food Lion, Inc., 893 F. Supp. 1092, 1112 (S.D. Ga. 1995) (denying defendant-employer's motion for summary judgment); Easley v. West, No. 93-6751, 1994 U.S. Dist. LEXIS 17789, at *31-32 (E.D. Pa. Dec. 13, 1994) (denying defendant-employer's motion to dismiss and motion for summary judgment); Davis v. York Int'l, Inc., No. HAR 92-3545, 1993 U.S. Dist. LEXIS 17649, at *36-38 (D. Md. Nov. 22, 1993) (denying defendant-employer's motion for summary judgment); *see* Brown v. Lester E. Cox Med. Ctr., 286 F.3d 1040, 1046-47 (8th Cir. 2002) (affirming verdict awarding $140,000 in damages for emotional distress caused by defendant-employer's decision to transfer plaintiff to a position below her qualifications on the basis of her disability); *see also* Wheeler v. Marathon Printing, Inc. 974 P.2d 207, 216-17 (Or. App. 1998) (upholding harassment claim on basis of state law).

168. *See* Vollmert v. Wis. Dep't of Transp., 197 F.3d 293, 297 (7th Cir. 1999) (finding trainer's unfavorable actions not so severe or pervasive as to establish a hostile environment); Cannice v. Norwest Bank Iowa N.A., 189 F.3d 723, 728 (8th Cir. 1999) (reversing damages award on the ground that knowledge of a disability did not motivate offensive conduct); Walton v. Mental Health Ass'n, 168 F.3d 661, 667 (3d Cir. 1999) (finding conduct not pervasive or severe enough to meet standard for liability); Wallin v. Minn. Dep't of Corr., 153 F.3d 681, 688 (8th Cir. 1998) (finding incidents isolated and not severe or pervasive); Keever v. City of Middletown, 145 F.3d 809, 813 (6th Cir. 1998) (affirming summary judgment based on failure to allege facts sufficient to establish severity); Overstreet v. Calvert County Health Dep't, 187 F. Supp. 2d 567, 575 (D. Md. 2002) (granting summary judgment on the ground that conduct did not constitute constructive discharge); Georgy v. O'Neill, No. 00-CV-0660 (FB), 2002 U.S. Dist. LEXIS 4825, at *32-33 (E.D.N.Y. Mar. 22, 2002) (granting summary judgment upon finding conduct not continuous and pervasive); Richio v. Miami-Dade County, 163 F. Supp. 2d 1352, 1370-71 (S.D. Fla. 2001) (finding harassment not severe enough to constitute constructive discharge); Roeder v. Hendricks Cmty. Hosp., No. IP 00-447-CH/G, 2001 U.S. Dist. LEXIS 24619, at *34-35 (S.D. Ind. Sept. 7, 2001) (granting summary judgment on the ground that the conduct lacked severity or pervasiveness); Griffin v. Jefferson Parish Sch. Bd., No. 99-1344 REF, 2001 U.S. Dist. LEXIS 13238, at *24 (E.D. La. Aug. 17, 2001) (granting summary judgment on the ground that harassment is not based on disability); Ballard v. Healthsouth Corp., 147 F. Supp. 2d 529, 538 (N.D. Tex. 2001) (granting summary judgment on grounds of lack of severity and pervasiveness); McCoy v. USF Dugan, Inc., No. 99-1504-JTM, 2001 U.S. Dist. LEXIS 6980, at *9 (D. Kan. May 21, 2001) (granting summary judgment on the ground that the conduct is not sufficiently severe); Johnston v. Henderson, 144 F. Supp. 2d 1341, 1361-62 (S.D. Fla. 2001) (granting summary judgment on grounds of severity and pervasiveness of conduct); Jeseritz v. Henderson, No. CIV 99-1439 RHK JMM, 2001 WL 420164, at *10 (D. Minn. Feb. 9, 2001) (granting summary judgment on the grounds that the conduct lacked severity or pervasiveness); Davis-Durnil v. Village of Carpentersville, 128 F. Supp. 2d 575, 584-85 (N.D. Ill. 2001) (finding comments and other actions not sufficient

B. Education

Title II of the ADA[169] and section 504 of the Rehabilitation Act of 1973[170] bar public schools from discriminating on the basis of disability.[171] These general prohibitions on discrimination, supplemented by regulations that spell out various kinds of forbidden discrimination,[172] supply the basis of an analogy to Title VII with regard to hostile environment claims. Provided that students can meet the formidable severe-or-pervasive standard, their claims should be as successful under Title II and section 504 as those of Fox and Flowers under ADA Title I.

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to constitute severe or pervasive conduct); Soledad v. United States Dep't of Treasury, 116 F. Supp. 2d 790, 801 (W.D. Tex. 2000) (granting judgment as a matter of law for defendant and overturning jury verdict, ruling conduct not severe or pervasive); Comber v. Prologue, Inc., Civ. No. JFM-99-2637, 2000 U.S. Dist. LEXIS 16331, at *29 (D. Md. Sep. 28, 2000) (granting summary judgment on ground of no pervasive hostility); Harshbarger v. Sierra Pac. Power Co., 128 F. Supp. 2d 1302, 1310-11 (D. Nev. 2000) (granting summary judgment, finding conduct not severe or pervasive); Scherer v. GE Capital, No. 99-2172-GTV, 2000 U.S. Dist. LEXIS 9152, at *19 (D. Kan. June 2, 2000) (granting summary judgment for lack of severe or pervasive conduct); Fitch v. Solipsys Corp., 94 F. Supp. 2d 670, 677 (D. Md. 2000) (granting summary judgment for failure to show severe or pervasive conduct); Veal v. AT&T Corp., No. CIV. 99-0370, 2000 U.S. Dist. LEXIS 3863, at *21-23 (E.D. La. Mar. 22, 2000) (granting summary judgment, finding conduct insufficiently pervasive and not motivated by disability); Ward v. Massachusetts Health Research Inst., 48 F. Supp. 2d 72, 81 (D. Mass 1999) (granting summary judgment on grounds of lack of severity and official knowledge); Schwertfager v. City of Boynton Beach, 42 F. Supp. 2d 1347, 1367 (S.D. Fla. 1999) (granting summary judgment on the grounds that the environment was not shown to be objectively abusive); Fosburg v. Lehigh Univ., No. Civ. A. 98-CV-864, 1999 WL 12445, *6 (E.D. Pa. Mar. 4, 1999) (finding on allegations of complaint that harassment did not reach the level of hostility or pervasiveness needed to state a claim); Pomilio v. Wachtell Lipton Rosen & Katz, No. 97 Civ. 2230 (MBM), 1999 WL 9843 (S.D.N.Y. Jan. 11, 1999) (granting summary judgment on the grounds that comments were isolated); Hoffman v. Brown, No. 1:96cv225-C, 1997 WL 827526 (W.D.N.C. Oct. 24, 1997) (granting summary judgment due to absence of evidence of impact of utterances on the work environment); Rodriguez v. Loctite Puerto Rico, 967 F. Supp. 653, 667 (D.P.R. 1997) (granting summary judgment on basis of absence of evidence of pervasive hostility); Gray v. Ameritech Corp., 937 F. Supp. 762, 771 (N.D. Ill. 1996) (granting summary judgment on grounds of absence of knowledge of conduct by defendant); *see also* Robel v. Roundup Corp., 10 P.3d 1104, 1111 (Wash. App. 2000) (finding conduct not severe or pervasive; applying state law). The cases rejecting claims on the grounds of severity or pervasiveness assume that a cause of action exists under the ADA for a hostile work environment.

169. 42 U.S.C. § 12132 (2000) (covering services provided by state and local government).

170. 29 U.S.C. § 794 (2000) (covering federally assisted programs and activities). *See generally* Mark C. Weber, *Disability Discrimination by State and Local Government: The Relationship Between Section 504 of the Rehabilitation Act and Title II of the Americans with Disabilities Act*, 36 WM. & MARY L. REV. 1089 (1995) (comparing Title II and Section 504).

171. *See* Weber, *School Harassment*, *supra* note 3, at 1093-97 (discussing causes of action under Section 504 of the Rehabilitation Act of Title II of the ADA).

172. *See, e.g.*, 34 C.F.R. §§ 104.41-104.43 (2002) (barring discrimination against disabled postsecondary students in the context of admission and participation in school programs).

An even closer analogy exists, however, to Title IX of the Education Amendments of 1972. The Supreme Court has recently upheld causes of action for sex harassment in public schools under Title IX, whose wording forbidding sex discrimination in educational programs receiving federal funds is identical to that forbidding disability discrimination by recipients of federal money under section 504 (and nearly identical to that forbidding discrimination by state and local government under Title II of the ADA).[173] In *Davis v. Monroe County Board of Education*,[174] the Supreme Court approved the award of damages against a school district for sexual harassment by a student's peers.[175] The Court said that liability exists when the responsible school official or officials were deliberately indifferent to known behavior serious enough to have a systemic effect of denying the victim equal access to an educational program or activity.[176] The Court found the standard to be met when school officials know that a student in the victim's school is engaging in sexually assaultive behavior, but fail to do anything to stop the activity, and the child then sexually assaults the plaintiff.[177] In *Gebser v. Lago Vista Independent School District*,[178] the Court applied a similar standard to teacher sexual harassment of students.[179] These Title IX cases support the conclusion that harassment motivated by a child's disability will produce liability under section 504 or ADA Title II if the deliberate indifference standard is met and the harassment has a systemic effect of denying the student with disabilities equal access to the educational program.

Using Title II of the ADA as the basis of liability, the Fourth Circuit has upheld a cause of action for damages for disability harassment

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173. Title II of the ADA recapitulates the section 504 prohibition against discrimination by public entities. *See* 42 U.S.C. § 12132 (1994) ("Subject to the provisions of this subchapter, no qualified individual with a disability shall, by reason of such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity."). The definition of banned conduct in the ADA regulations echoes that found in the section 504 regulations. *Compare* 28 C.F.R. § 35.130 (2002) (ADA Title II), *with* 34 C.F.R. § 104.4 (2002) (section 504). Although there are some technical distinctions between the two laws, the only difference for purposes of the current discussion is that Title II extends section 504 coverage to any public educational agency that does not receive federal money. *See* Weber, *supra* note 170, at 1109-16 (discussing the differences between section 504 and ADA Title II).

174. 526 U.S. 629 (1999).

175. *Id.* at 633.

176. *Id.*

177. *Id.* at 648.

178. 524 U.S. 274 (1998).

179. *Id.* at 277.

at school. *Baird v. Rose*[180] concerned a high school student named Kristen Baird, who was diagnosed with severe depression and placed on a counseling and medication program.[181] Her mother told personnel at Kristen's school about the diagnosis.[182] The following day, the teacher in Kristen's musical performance class announced to the entire class that Kristen would not be permitted to participate in the next performance, gave her role to another student, and excluded her from rehearsals.[183] Kristen's mother confronted the teacher, who gave various excuses at first but finally told her that she felt that individuals with depression "could not be counted on to meet their responsibilities."[184]

When the mother submitted letters from a doctor and psychologist stating that Kristen was fit to perform and that her mental health would deteriorate if she were excluded, the teacher tried to exclude her on a previously unenforced policy against being absent from class.[185] The principal told the teacher that if she were to exclude Kristen, she had to exclude all students who had been absent.[186] So, in Kristen's presence, the teacher announced to the class that, against her will, she had to remove three other students from part of the performance.[187] The teacher "then asked the class members if they understood why she was being forced to adhere to the strict attendance policy, and other students commented that someone was taking advantage of the lax enforcement of the attendance policy."[188] Humiliated, Kristen left the class crying uncontrollably and shaking; she eventually needed sedation.[189] In the end, she was excluded from many practices and all but a small part of the performance.[190] She experienced sleeplessness, fear of humiliation, symptoms of physical illness, and a decline in grades.[191]

The court reversed the dismissal of Kristen's claim for damages under Title II of the ADA.[192] The court stated that to establish an

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180. 192 F.3d 462 (4th Cir. 1999).
181. *Id.* at 464-65.
182. *Id.* at 465.
183. *Id.*
184. *Id.*
185. *Id.* at 465, 467-68.
186. *Id.* at 466.
187. *Id.*
188. *Id.* at 466.
189. *Id.*
190. *Id.*
191. *Id.*
192. *Id.* at 473. The Court affirmed the dismissal of a retaliation claim, but reversed the dismissal of a pendent claim for intentional infliction of emotional distress. *Id.*

ADA claim, the plaintiff had to sustain three elements: that the person has a disability, is otherwise qualified for the benefit at issue, and "was excluded from the benefit due to discrimination solely on the basis of the disability."[193] The issue in dispute in *Baird* was whether the discrimination was on the basis of the student's depression.[194] The court ruled that the plaintiffs had sufficiently alleged that the charge of absenteeism was a pretext,[195] and that disability discrimination was a motivating factor for the adverse action.[196]

As with the successful workplace hostile environment cases, however, one should not mistake the favorable result in *Baird* for the tip of the iceberg. The far more common result in cases of this type is the fate of Robert Kubistal or Charlie F.[197] The plaintiffs' cases are dismissed for failure to exhaust administrative remedies.[198]

IV. POTENTIAL LEGAL REMEDIES

It is my belief that additional remedies exist for plaintiffs to redress instances of workplace and school harassment, and to deter would-be harassers. By deterring harassment, application of these remedies will contribute to the integration of persons with disabilities into the mainstream of society.

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193. *Id.* at 467.

194. *Id.*

195. *Id.* at 468, 468 n.6.

196. *Id.* at 470.

197. *See* Kubistal v. Hirsch, No. 98 C 3838, 1999 U.S. Dist. LEXIS 1613, at *21 (N.D. Ill. Feb. 9. 1999); Charlie F. v. Bd. of Educ., 98 F.3d 989, 993 (7th Cir. 1996) (denying relief to school children who were subjected to discrimination and harassment).

198. *See Charlie F.*, 98 F.3d at 993 (dismissing case in which teacher encouraged harassment of student); *Kubistal*, 1999 U.S. Dist. LEXIS 1613, at *21 (dismissing case involving ridicule and humiliation by teacher of student with visual impairment); Franklin v. Frid, 7 F. Supp. 2d 920, 927 (W.D. Mich. 1998) (involving aide's physical and psychological abuse of child with cerebral palsy); Shields v. Helena Sch. Dist. No. 1, 943 P.2d 999, 1006 (Mont. 1997) (involving exclusion from trip, humiliation, and name-calling by teachers). In two cases, courts used exhaustion as a basis to dismiss cases brought by parents for retaliation, despite the obvious fact that the administrative process could provide no useful relief to the parents. *See* Weber v. Cranston Sch. Comm., 212 F.3d 41, 54 (1st Cir. 2000) (affirming grant of summary judgment based on failure to exhaust administrative remedies); Babicz v. Sch. Bd., 135 F.3d 1420, 1422 (11th Cir. 1998) (affirming dismissal of case, without prejudice, for failing to exhaust administrative remedies). In *Weber*, the court relied on the plaintiffs' failure to allege that exhaustion was burdensome or futile. *Weber*, 212 F.3d at 52-53. In *Babicz*, the court appeared not to have been aware that Congress overruled *Smith v. Robinson*, 468 U.S. 992 (1984), or perhaps it was not aware that the parent was suing on her own behalf as well as that of her children. *See Babicz*, 135 F.3d at 1422 (citing *Smith*, 468 U.S. at 1009). *See generally* Weber, *School Harassment*, *supra* note 3, at 1134-41 (discussing legislative overruling of *Smith* and its relevance to exhaustion issue).

A. *Work*

In the workplace, the key source of protection is 42 U.S.C. § 12203(b):[199]

> It shall be unlawful to coerce, intimidate, threaten, or interfere with any individual in the exercise or enjoyment of, or on account of his or her having exercised or enjoyed, or on account of his or her having aided or encouraged any other individual in the exercise or enjoyment of, any right granted or protected by this chapter.[200]

The statute applies not just to the workplace.[201] As a provision of Title V of the ADA, this statute applies to employment, to public services such as schools, and to private sources of public accommodation covered by ADA Title III.[202] However, the Title I (employment) regulations make the provision particularly applicable because they contain a provision amplifying the meaning of the statutory language as applied to the work settings:

> It is unlawful to coerce, intimidate, threaten, *harass*, or interfere with any individual in the exercise or enjoyment of . . . any right granted or protected by this part.[203]

These statutory and regulatory provisions are distinct from the ban on retaliation that is found in the other subsection of § 12203.[204] Unlike the § 12203(a) retaliation provision and Title VII's language with regard to race, sex, and national origin, § 12203(b) bars all coercion, intimidation, threatening, and interference, without requiring that the conduct amount to "discrimination."[205] The breadth of this ban on coercion, intimidation, threatening and interference stands in sharp contrast to the limited amount of harassment—only that which is severe or pervasive—that the Supreme Court has found to be em-

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199. For a more fully developed argument on this topic, see Weber, *Workplace Harassment Claims*, *supra* note 3, at 250-65.

200. 42 U.S.C. § 12203(b) (2000).

201. Title V of the ADA contains a list of miscellaneous provisions that apply to the entire Act. *See* 42 U.S.C. §§ 12201-12210.

202. *Id.*

203. 29 C.F.R. § 1630.12(b) (2002) (emphasis added).

204. *See* 42 U.S.C. § 12203(a) (2000) ("Retaliation. No person shall discriminate against any individual because such individual has opposed any act or practice made unlawful by this chapter or because such individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this chapter."). Subsection (b) is headed "Interference, coercion, or intimidation" rather than "Retaliation." *Id.* § 12203(b).

205. *See id.* § 12203(b) (omitting the requirement that conduct amount to discrimination).

braced in the definition of discrimination.[206] Verbal abuse is a very effective means of coercing, intimidating, and interfering with the exercise of the right to work on equal terms or with reasonable accommodations. Verbal threats, which are commonly found in cases that courts throw out as inadequate to sustain a harassment claim,[207] are specific violations of § 12203(b).[208]

The role of § 12203(b) should be to provide a remedy for conduct that coerces and intimidates workers with disabilities from coming to work each day and performing the same jobs that workers without disabilities do, that interferes with their exercise of the primary right under Title I: To be employed with or without accommodations in the mainstream of the workplace.[209] The statute renders that coercive conduct actionable, even when the conduct does not meet the judiciary's standard for severity or pervasiveness with regard to discrimination in violation of § 12112(a) of the ADA, the general anti-discrimination provision of Title I.

A comparison of the basis of Title VII harassment-as-part-of-discrimination with § 12203(b) harassment, in the form of coercion, intimidation, threats, and interference, supports the point that the severe-or-pervasive test is out of place in § 12203(b). The Supreme Court has declared that the purpose of the Title VII test of severity or pervasiveness is to eliminate cases regarding conduct that does not alter the terms and conditions of employment.[210] Because bans on coercion, intimidation, threats, and interference do not need to be derived from a ban on something termed "discrimination," they do not have to amount to a change in the terms or conditions of employment to be actionable. If they did, there would be no need for a separate provision spelling them out. Harassment made actionable under the Title I regulation applicable to § 12203(b) should be measured by

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206. *See* Harris v. Forklift Sys., Inc., 510 U.S. 17, 21 (1993) (establishing a high standard to meet for finding actionable harassment in Title VII cases).

207. *See, e.g.*, Silk v. City of Chicago, 194 F.3d 788, 796 (7th Cir. 1999) (describing physical threat against worker with disabilities).

208. *See* 42 U.S.C. § 12203(b) (prohibiting coercion, threats or interference with an individual's exercise or enjoyment of his or her protected rights).

209. *See* 42 U.S.C. § 12112(a) (2000) (barring employment discrimination against qualified individuals with disabilities).

210. *Harris*, 510 U.S. at 21-22; *see also* Faragher v. City of Boca Raton, 524 U.S. 775, 788 (1998) (noting that "simple teasing . . . offhand comments, and isolated incidents (unless extremely serious) will not amount to discriminatory changes in the 'terms and conditions of employment'") (citations omitted). The *Faragher* Court added that "[w]e have made it clear that conduct must be extreme to amount to a change in the terms and conditions of employment." *Id.*

the ordinary definition of the term: "to disturb persistently; torment,"[211] "to annoy persistently."[212]

B. School

As for harassment in public school settings, I have argued elsewhere that causes of action for damages should exist for violations of Title II of the ADA, section 504 of the Rehabilitation Act, the Individuals with Disabilities Education Act (IDEA) as enforced under 42 U.S.C. § 1983, and, in appropriate cases, the United States Constitution and the common law.[213] Although some authorities might disagree with my views about the propriety of any or all of those remedies in any given case,[214] the primary obstacle to plaintiffs in school harassment cases is not an absence of grounds on which to sue, but rather the presence of a defense of failure to exhaust administrative remedies under IDEA.

A correct reading of IDEA's exhaustion requirement does not require plaintiffs seeking damages for harassment to exhaust administrative remedies. The general rule in cases brought under the statute is that the due process hearing procedure must be exhausted before the matter can go to court.[215] IDEA provides:

> [B]efore the filing of a civil action under . . . laws [such as the Constitution, the ADA, or section 504] seeking relief that is also available under [IDEA], the procedures [for administrative hearings and appeals] shall be exhausted to the same

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211. THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE 870 (2d ed. 1987).

212. MERRIAM WEBSTER'S COLLEGIATE DICTIONARY 529 (10th ed. 1993). Similarly, coercion, intimidation, threats, and interference should be given the ordinary meanings these terms have, rather than converted into terms of art. Courts construing federal statutory provisions similar to § 12203(b) have given the words broad, common-sense definitions. *See* Weber, *School Harassment*, *supra* note 3, at 1093-1101 (discussing harassment case law). This definition excludes trivial or inconsequential conduct, but covers activity that would not meet the Title VII-style severe-or-pervasive test. *See id.* at 1097-1100 (discussing appropriate and inappropriate applications of § 12203(b)).

213. Weber, *School Harassment*, *supra* note 3, at 1093-1134 (discussing causes of action for harassment). Claims also lie under 42 U.S.C. § 12203(b), under the same analysis that applies to the employment cases. *See id.* at 1097 (discussing claims under § 12203(b)).

214. *See, e.g.*, Padilla v. Sch. Dist. No. 1, 233 F.3d 1268, 1275 (10th Cir. 2000) (finding no claim for damages under § 1983 for violations of IDEA); *see also* Sellers v. Sch. Bd., 141 F.3d 524, 532 & n.6 (4th Cir. 1998) (precluding § 1983 action for "the more general denial of a free appropriate public education"); Terry Jean Seligmann, *A Diller, A Dollar: Section 1983 Damage Claims in Special Education Lawsuits*, 36 GA. L. REV. 465, 520 (2002) (arguing that the legislative intent behind IDEA does not support damage claims).

215. *See generally* WEBER, *supra* note 96, § 21.8 (discussing administrative exhaustion in special education cases).

> extent as would be required had the action been brought under [IDEA].[216]

Although Congress intended IDEA's exhaustion requirement to contain exceptions in a significant number of instances,[217] many courts have failed to understand the congressional message.[218] In

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216. 20 U.S.C. § 1415(*l*) (2000).

217. The legislative history of the statute that is now IDEA includes a statement from Senator Harrison Williams, who was its principal author, that "exhaustion of the administrative procedures established under this part should not be required . . . in cases where such exhaustion would be futile either as a legal or practical matter." 121 CONG. REC. 37,416 (1975). When Congress added what is now 20 U.S.C. § 1415(*l*) in 1986, Senator Simon and Representative Miller, who managed the bill in the Senate and House, described the congressional understanding of when the exhaustion requirement does not apply:

> It is important to note that there are certain situations in which it is not appropriate to require the exhaustion of EHA [Education of the Handicapped Act, now IDEA] administrative remedies before filing a civil law suit. These include complaints that: First, an agency has failed to provide services specified in the child's individualized educational program [IEP]; second, an agency has abridged or denied a handicapped child's procedural rights—for example, failure to implement required procedures concerning least restrictive environment or convening of meetings; three, an agency had adopted a policy or pursued a practice of general applicability that is contrary to the law, or where it would otherwise be futile to use the due process procedures—for example, where the hearing officer lacks the authority to grant the relief sought; and four, an emergency situation exists—for example, failure to provide services during the pendency of proceedings, or a complaint concerning summer school placement which would not likely be resolved in time for the student to take advantage of the program.

131 CONG. REC. 21,392-93 (1985) (statement of Sen. Simon). Representative Miller added that "neither I nor others who wrote the law intended that parents should be forced to expend valuable time and money exhausting unreasonable or unlawful administrative hurdles . . . ." *Id.* at 31,376.

218. *See, e.g.*, Doe v. Ariz. Dep't of Educ., 111 F.3d 678, 685 (9th Cir. 1997) (requiring exhaustion in action over failure to provide special education services to eligible jail inmates); Gardner v. Sch. Bd., 958 F.2d 108, 112 (5th Cir. 1992) (requiring exhaustion in challenge to policy forbidding taping of meetings); Hayes v. Unified Sch. Dist. No. 377, 877 F.2d 809, 814 (10th Cir. 1989) (requiring exhaustion in challenge to use of time-out rooms); Crocker v. Tenn. Secondary Sch. Athletic Ass'n, 873 F.2d 933, 937 (6th Cir. 1989) (reversing on exhaustion grounds injunction against rule preventing participation in sports by child who transferred between schools when the learning disability allegedly caused the transfer); Radcliffe v. Sch. Bd., 38 F. Supp. 2d 994, 1000 (M.D. Fla. 1999) (requiring exhaustion in dispute over policy forbidding scheduling of meeting outside of regular school hours). Courts have also required exhaustion even when hearing rights or other procedural guarantees have been denied. *See, e.g.*, W.L.G. v. Houston County Bd. of Educ., 975 F. Supp. 1317, 1329 (M.D. Ala. 1997) (holding that claim based on refusal to obey settlement agreement had to be exhausted); Koster v. Frederick County Bd. of Educ., 921 F. Supp. 1453, 1457 (D. Md. 1996) (requiring exhaustion despite plaintiff's claim that notice was inadequate).

many cases involving allegations of disability harassment, courts have dismissed damages claims for lack of administrative exhaustion.[219]

Since hearing officers may not award damages in the IDEA administrative process,[220] these courts are ignoring the futility exception built into the exhaustion requirement.[221] Furthermore, because many of the cases, such as *Charlie F.*,[222] do not even involve an IDEA claim, the courts are also ignoring the language of § 1415(*l*), which requires exhaustion of claims under statutes other than IDEA only when the relief sought would be available under IDEA,[223] a statute that does not permit hearing officers to award damages.[224] Recognizing the strength of these arguments, many courts have refused to require exhaustion in harassment and analogous cases.[225]

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219. *See, e.g.*, Charlie F. v. Bd. of Educ., 98 F.3d 989, 993 (7th Cir. 1996) (involving ridicule and humiliation of student with attention deficit disorder and panic attacks); Kubistal v. Hirsch,. No. 98 C 3838, 1999 U.S. Dist. LEXIS 1613, at *21 (N.D. Ill. Feb. 9, 1999) (involving ridicule and isolation of student with visual impairment by teacher and principal); Franklin v. Frid, 7 F. Supp. 2d 920, 927 (W.D. Mich. 1998) (concerning aide's physical and psychological abuse of child with cerebral palsy); Shields v. Helena Sch. Dist. No. 1, 943 P.2d 999, 1006 (Mont. 1997) (concerning exclusion from trip, humiliation, and name-calling by teachers).

220. *See, e.g.*, W.B. v. Matula, 67 F.3d 484, 495-96 (3d Cir. 1995) (indicating that damages are not available in an IDEA administrative proceeding).

221. *See supra* note 217 and accompanying text (demonstrating that the legislative intent underlying IDEA was to not require exhaustion of administrative procedures if exhaustion would be futile).

222. In *Charlie F.*, the plaintiff brought claims for violations of the Constitution, section 504, Title II of the ADA, and state law. *Charlie F.*, 98 F.3d at 991.

223. 20 U.S.C. § 1415(*l*) (2000). The first half of the provision helps make this point clear by emphasizing the availability of remedies under statutes that provide relief that includes damages:

> Nothing in this chapter shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution, the Americans with Disabilities Act of 1990 . . . , title V of the Rehabilitation Act . . . , or other Federal laws . . . except that before the filing of a civil action under such laws seeking relief that is also available under this subchapter, [the administrative] procedures [required by] this section shall be exhausted to the same extent as would be required had the action been brought under this subchapter.

Id.

224. *See* Padilla v. Sch. Dist. No. 1, 233 F.3d 1268, 1274-75 (10th Cir. 2000) (noting that damages are not available under IDEA at the administrative hearing level).

225. *See id.* at 1274-75 (holding that exhaustion was not necessary in the case of a child who fractured her skull after falling from a stroller placed in a closet); Covington v. Knox County Sch. Sys., 205 F.3d 912, 917 (6th Cir. 2000) (declaring that exhaustion was not required in the case of a child kept isolated in a vault-like room); Witte v. Clark County Sch. Dist., 197 F.3d 1271, 1276 (9th Cir. 1999) (refusing to require exhaustion in case where child was force-fed, choked, and abused); *W.B.*, 67 F.3d at 495-96 (refusing to require exhaustion in case over delays in evaluation and placement of child); McKay v. Winthrop Bd. of Educ., No. 96-131-B, 1997 U.S. Dist. LEXIS 23372, at *9-10 (D. Me. June 6, 1997) (holding that section 504 and ADA damage claims for failure to make building ac-

Policy considerations might be advanced to support the application of the exhaustion requirement in special education damages cases.[226] The policies behind administrative exhaustion include making maximum use of both the policymaking authority and expertise of administrators, and achieving economy in provision of procedural mechanisms to challenge government decisions.[227] The connection between exhaustion and those policies is highly attenuated in educational harassment damages cases, however. First, the due process hearing officer is required to be independent of the school system and the state educational agency,[228] and, therefore, is in no position to develop policy for those entities.[229] Second, the due process hearing officer need have no particular qualifications[230] and, thus, will not necessarily have any expertise to apply. Third, courts deny that hearing officers have the power to order awards of damages,[231] and it is not clear that hearing officers confronting damages-only claims would even hold a hearing. Even if they do, it is highly likely that after the hearing the parties will take the case to court and retry it before a jury—the factfinder in a section 504 or ADA damages case[232]—thereby eliminating any administrative or judicial economy advantages of exhaustion.

Moreover, Congress did not approach exhaustion in special education cases purely as a policy matter.[233] Congress understood that practical considerations about the utility of the administrative process should control and recognized the probable weaknesses in the IDEA

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cessible need not be exhausted, stressing the absence of availability of damages under IDEA).

226. *See* Seligmann, *supra* note 214, at 520-26, 528-32 (citing a number of rationales for supporting the exhaustion doctrine, including accuracy, efficiency, agency autonomy, and judicial economy).

227. WEBER, *supra* note 96, § 21.8 (discussing the policies underlying the exhaustion doctrine and collecting authorities).

228. 20 U.S.C. § 1415(f)(3) (2000); *see* Mayson v. Teague, 749 F.2d 652, 657-58 (11th Cir. 1984) (applying independence requirement).

229. *See Mayson*, 749 F.2d at 655 (affirming the decision that "university personnel who have actively participated in the formulation of state educational policies" are not permitted to act as hearing officers).

230. Carnwath v. Grasmick, 115 F. Supp. 2d 577, 583 (D. Md. 2000) ("There is no federal right to a competent or knowledgeable [special education] ALJ."); *see* Carnwath v. Bd. of Educ., 33 F. Supp. 2d 431, 434 (D. Md. 1998) (finding no training requirements for due process hearing officers in IDEA).

231. *See, e.g.*, W.B. v. Matula, 67 F.3d 484, 495-96 (3d Cir. 1995) (discussing the administrative law judge's inability to award damages).

232. *See* Whitehead v. Sch. Bd., 918 F. Supp. 1515, 1523-24 (M.D. Fla. 1996) (upholding jury trial right in a section 504 action for damages in a special education case).

233. *See supra* note 217 and accompanying text (discussing exceptions to IDEA's exhaustion requirement).

due process scheme.[234] Section 1415(*l*) excuses exhaustion when the claim is brought under a provision other than the IDEA cause of action and the relief sought is not available under IDEA.[235] The language of § 1415(*l*) prevails over any administrative law policy that might call for its judicial rewriting.

V. NEW LEGISLATIVE AND ADMINISTRATIVE MEASURES

Deterring and remedying harassment by means of § 12203(b) and other legal remedies will go far to promote integration by workers and students with disabilities as equals in society. The remedies will not be enough to institute full integration, but they represent a start. There is a striking need for further innovation. Some of the potential measures are only modest reforms of existing law; one hopes that they would garner significant support.

A. The Need for Additional Legal Measures to Promote Integration

The legal prohibitions against segregation and exclusion found in the ADA[236] might be thought to complete the process of integrating workers and students, but the ADA provisions have seen little development. This is a sharp contrast to the extensive development of the definition provisions and the qualified individual-reasonable accommodation provisions.[237] One of the rare ADA employment cases concerning segregation, *Duda v. Board of Education*,[238] upheld a Title I claim when a school district learned that a janitor had a mental illness and responded by transferring him to a location where he had to work by himself, instructing him not to speak to anyone.[239] As for public services, *Olmstead v. L.C. ex rel. Zimring*[240] is the case of note, but other cases have not developed its ideas as much as might be hoped.[241] The

234. *See id.*

235. *See id.*

236. 42 U.S.C. § 12112(b)(1) (2000); *see also* 28 C.F.R. § 35.130(b)(1)(iv) (2002).

237. *See* 42 U.S.C. §§ 12102, 12111 (2000).

238. 133 F.3d 1054 (7th Cir. 1998).

239. *Id.* at 1059-60. *But see* Tyler v. Ispat Inland Inc., 245 F.3d 969, 973-74 (7th Cir. 2001) (recognizing segregation as discrimination, but finding that refusal to transfer employee with mental illness back to the original job site failed to constitute violation when employee was integrated with other workers at new site). *See generally supra* notes 97-98 and accompanying text (discussing *Duda* and *Tyler*).

240. 527 U.S. 581 (1999); *see supra* notes 84-92 and accompanying text (discussing *Olmstead*).

241. *See* Bruggeman v. Glagojevich, 324 F.3d 906, 913 (2003) (reversing dismissal of section 504 and ADA Title II claim for non-institutional residential services to individuals with developmental disabilities; recommending that parties and court apply *Olmstead* on remand).

education cases decided under IDEA go in both directions on the issue of integration of children with disabilities into the mainstream, demonstrating significant differences in attitude among the judicial circuits.[242]

Apart from the ADA provision enforced in *Olmstead* and the special education law provision relating to the least restrictive environment, there is little in the law or public programs that affirmatively integrates people with disabilities into mainstream society. Professor Stein observes:

> [I]mprovement in blacks' relative earnings has been realized because of the federal government's massive enforcement of antidiscrimination policies, including voting rights and school desegregation, that were concentrated on the South. Currently, there exists no equivalent monumental federal government enforcement policy of employing or integrating the disabled.[243]

B. Legal Reforms to Promote Integration

What is needed is a legislative agenda that will go beyond ending harassment and forbidding segregation, and will actively promote interaction between individuals with disabilities and without disabilities on an equal level. I believe that this agenda would have several components:

1. Vocational Services Reforms.—Currently, vocational services provided to people with disabilities focus on sheltered work and, for individuals with more skills, supported employment in mainstreamed

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242. *Compare* Oberti v. Bd. of Educ., 995 F.2d 1204, 1223 (3d Cir. 1993) (approving mainstreamed program for child with Down's syndrome), *with* Beth B. v. Van Clay, 282 F.3d 493, 499 (7th Cir.), *cert. denied*, 537 U.S. 948 (2002) (rejecting mainstreamed placement for child with Rett syndrome). *See generally* Mark C. Weber, *The Least Restrictive Environment Obligation as an Entitlement to Educational Services: A Commentary*, 5 U.C. DAVIS J. JUV. L. & POL'Y 147 (2001) (discussing interpretation of obligation to educate children with disabilities in least restrictive environment); Joshua Andrew Wolfe, Note, *A Search for the Best IDEA: Balancing the Conflicting Provisions of the Individuals with Disabilities Education Act*, 55 VAND. L. REV. 1627 (2002) (comparing approaches of U.S. Circuits in cases regarding placement of students in the least restrictive environment). Integration remains an important goal and a paper protection in the ADA, but the norm is underenforced.

243. Michael Ashley Stein, *Employing People with Disabilities: Some Cautionary Thoughts for Second-Generation Civil Rights Statute*, *in* EMPLOYMENT, DISABILITY, AND THE AMERICANS WITH DISABILITIES ACT, *supra* note 111, at 51, 53. As noted above, an exception, although it can hardly be called a monumental effort in light of the results, is the integration mandate in the Individuals with Disabilities Education Act. *See supra* note 242 and accompanying text (discussing least restrictive environment obligation in IDEA).

settings.[244] In recent years, the program's emphasis on supported employment has grown.[245] This growth should continue, for it permits more people with more severe disabilities to succeed in the competitive workplace. The law should also encourage the development of small businesses run by people with disabilities. A program to foster entrepreneurship among individuals with disabilities has seen success in Iowa and should be replicated elsewhere through state legislation.[246] Supported employment brings people into the workplace, but the hazard is that the new workers will not be perceived as equal and may be subject to harassment and other discouragement unless the ADA is vigorously enforced.[247] Entrepreneurship programs seek to avoid the inferiority problem by effectively making the vocational services client the boss, serving customers just as any other merchant does, while receiving support as needed from the vocational services agency.[248]

2. *Affirmative Action and Job Set-asides for Qualified Workers with Disabilities.*—In other writing, I have advocated enforcement of existing laws requiring federal agencies and federal contractors to engage in affirmative action to employ individuals with disabilities.[249] I have also proposed importing to the United States the programs found elsewhere in the developed world that require employers to set aside a fraction of their jobs for people who have severely disabling conditions.[250] Others have challenged various aspects of these reforms.[251] Of greatest concern here, however, is to what extent actively promoting the hiring of individuals with disabilities, to the point of setting

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244. *See* Mark C. Weber, *Towards Access, Accountability, Procedural Regularity and Participation: The Rehabilitation Act Amendments of 1992 and 1993*, J. REHABILITATION, July-Sept. 1994, at 21.

245. *Id.* at 21-23 (describing increased emphasis on programs that involve placement of individuals in competitive employment with job coaches and other supports).

246. *See* Peter D. Blanck et al., *The Emerging Workforce of Entrepreneurs with Disabilities: Preliminary Study of Entrepreneurship in Iowa*, 85 IOWA L. REV. 1583 (2000) (discussing small-business creation programs).

247. *See* Weber, *supra* note 244, at 22 (describing the 1992 and 1993 amendments to the Rehabilitation Act and their effects on supported employment).

248. Innovative programs of this type include a Canadian one providing catering and executive gifts and one in Maryland furnishing organic vegetables. *See* Bow Catering, *About Us*, *at* http://www.bowcatering.ca/aboutus.html (last visited Aug. 20, 2003); Red Wiggler Foundation Mission Organization, *at* http://www.redwiggler.org/aboutus/organization.html (last visited Aug. 20, 2003).

249. *See* Mark C. Weber, *Beyond the Americans with Disabilities Act: A National Employment Policy for People with Disabilities*, 46 BUFF. L. REV. 123, 142-66 (1998).

250. *Id.* at 166-74.

251. *See, e.g.*, Tucker, *supra* note 18, at 386-87 (arguing against the use of set-asides for people with disabilities).

aside a percentage of jobs, promotes or fails to promote integration. There is certainly a risk that workers who are hired to fill a quota or other government mandate might be featherbedded or assigned a marginal status.[252] Nevertheless, the genius of the free enterprise system is that the employer has the incentive to make the maximum profit from whatever employees are there and to permit workers to gravitate to wherever they will contribute the most marginal utility to the company.[253] Enforcement of reasonable accommodation mandates should help that movement.[254] It is also likely that as the income of workers with disabilities increases, their status will rise, and this will help diminish status differentials.[255] Interestingly, the more commonly identified problem with the European programs is not segregation of workers, but outright evasion of the law,[256] a problem that sufficient governmental willpower could solve.

3. Enhancement of Special Education Related Services.—The obligation to mainstream children with disabilities at school has been viewed for far too long as the negative command: Thou shalt not segregate. In fact, the language of the statute imposes a positive obligation: School systems shall provide services to permit children to be integrated successfully. The language requires that states must guarantee that:

> To the maximum extent appropriate, children with disabilities . . . are educated with children who are not disabled, and that special classes, separate schooling, or other removal of children with disabilities from the regular education environment occurs only when the nature or severity of the disability . . . is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.[257]

The obligation is a positive one, to provide related services such as those of aides and technology, in order to achieve satisfactory edu-

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252. *See* Weber, *supra* note 249, at 172 (noting that such practices provide individuals with disabilities no opportunities for advancement).

253. *Id.* at 172-73.

254. *Id.*

255. *Id.* at 173; *see* WORK IN AMERICA: REPORT OF A SPECIAL TASK FORCE TO THE SEC'Y OF HEALTH, EDUC. & WELFARE 34-36 (1973) (describing economic status as most important determinant of social acceptance).

256. *See* Lisa Waddington, *Reassessing the Employment of People with Disabilities in Europe: From Quotas to Anti-Discrimination Laws*, 18 COMP. LAB. L.J. 62, 66-69 (1996) (noting the success of the German system of job quotas, but pointing out continuing problems with compliance).

257. 20 U.S.C. § 1412(a)(5)(A) (2000).

cation in regular classes.[258] Often, however, the services are deficient, integrated schooling fails, and the courts declare the child, rather than the school system, to be the problem.[259] States need to legislate the provision of related services and appropriate the money for them in order to comply with the related services mandate; the federal government must hold the states accountable for fulfilling their obligations.

4. Welfare Reform.—In another writing, I have also suggested that Social Security should be expanded to provide partial disability benefits for people who have significant limitations, but who do not meet the Social Security Disability Insurance standard of total incapacity expected to last more than a year or result in death.[260] A program of this type would help pull people with disabilities out of poverty, while at the same time encouraging them to seek work in order to have income to supplement the pension amounts.[261] Unlike the situation under existing Social Security, the person would not have to drop out of the labor force to receive benefits, but would be induced to work as much as manageable given the functional limits imposed by the disability and the continuing failure of the workplace to fully accommodate workers with disabling conditions.[262] Having a disability imposes costs on an individual.[263] Not only are medical bills of people with disabilities higher than those for other persons,[264] but disabilities typically reduce the hours a person can work and frequently diminish capacities to move, lift, communicate, and think—the activities that employers pay workers to do.[265] A system of partial disability benefits shifts some of those costs to the public;[266] it is a component of social security systems throughout Europe.[267] An American program would raise the condition of people with disabilities while encouraging integration in employment.[268]

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258. *See* Weber, *supra* note 242, at 148-51 (discussing school systems' obligation to comply with the positive mandate to provide services to facilitate mainstreaming).

259. *See* WEBER, *supra* note 96, §§ 9.2, 9.3-.6 (collecting cases).

260. *See* Weber, *supra* note 18, at 943-47 (advocating the provision of nonmeans-tested partial disability benefits for individuals with disabilities).

261. *Id.*

262. *Id.*

263. *Id.*

264. *Id.*

265. *Id.*

266. *Id.*

267. *See id.* at 945 ("In Europe, social security systems typically provide partial disability benefits if the individual has an impairment with effects severe enough to meet a threshold of loss of work capacity.").

268. *Id.* at 945-47.

The campaign in favor of the ADA was instrumental in bringing the disparate disability-specific groups into a formidable political movement.[269] A legislative reform effort may be just what the movement needs now to maintain that momentum.

VI. SOCIAL REFORM TO MATCH LAW REFORM

Does society alter the law, or does the law alter society? In actuality, it is some of both, of course. Voluntary social action to promote integration of individuals with disabilities into ordinary settings would go far to accomplish the ADA's legal goal of ending forced separation. One place to start would be voluntary action by employers and schools to diminish harassment. They need to adopt policies against harassment, train supervisors and co-workers, encourage the making of complaints of harassment, investigate the complaints, and impose effective sanctions when harassment occurs.[270]

The greater task, and one that I expect will remain a voluntary one for the foreseeable future, is the effort to integrate people with disabilities by altering social conditions—an effort to eliminate the distinction between the normal and the abnormal and to focus more on social relationships than on social categories.[271] Of course, this is an enormous task, and one to which category-based laws such as the ADA (and my category-based proposals) may in some respects work at cross purposes.[272] Nevertheless, there is much to be said for anything that helps redefine disability as part of everyday experience, rather than as abnormal, or strange, or "the other." Rosemarie Garland

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269. Michael Ashley Stein, *From Crippled to Disabled: The Legal Empowerment of Americans with Disabilities*, 43 EMORY L.J. 245, 255 (1994):

> [T]he campaign for the ADA's passage "brought this fragmented population together in a fight against discrimination." As noted at the time by ADA lobbyist Liz Savage, "People with epilepsy now will be advocates for the same piece of legislation as people who are deaf . . . . That has never happened before. And that's really historic."

(quoting JOSEPH P. SHAPIRO, NO PITY: PEOPLE WITH DISABILITIES FORGING A NEW CIVIL RIGHTS MOVEMENT 126-27 (1993) (footnotes omitted)).

270. *See* Steven D. Baderian et al., *Managing Employment Risks in Light of the New Rulings in Sexual Harassment Law*, 21 W. NEW ENG. L. REV. 343, 364-68 (1999) (describing components of effective policies against sexual harassment).

271. *See* MARTHA MINOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW 173-224 (1990) (encouraging movement away from emphasis on categories of people and towards emphasis on social relations); *cf.* MARTHA MINOW, NOT ONLY FOR MYSELF: IDENTITY, POLITICS, AND THE LAW 30-58 (1997) (suggesting uses and limits of group identities).

272. *See* Laura L. Rovner, *Perpetuating Stigma: Client Identity in Disability Rights Litigation*, 2001 UTAH L. REV. 247, 248-318 (discussing contradictions inherent in the portrayal of a person who experienced a denial of accommodations as a victim).

Thomson lauds advertising that works to redefine disability as an ordinary part of life and society:

> In the aggregate, contemporary advertising casts disabled people as simply one of many variations that compose the market to which they appeal. Such routinization of disability imagery not only brings disability as a common human experience out of the closet but enables people with disabilities—especially those who acquire impairments as adults—to imagine themselves as part of the ordinary world, rather than as a special class of untouchables and unviewables. . . . This form of realism constitutes a rhetoric of equality radical in its refusal to foreground disability as a difference.[273]

Unfortunately, the absence of economic power on the part of people with disabilities operates as a limit on what can be accomplished. Because of the poverty of people with disabilities, and the difficulty of using employment to get out of poverty, people with disabilities remain at the margins of the economy. Simon Ungar comments:

> Disabled people, as a relatively small and generally economically challenged group, have therefore not generally benefited from [accommodations]. Where businesses have made alterations, these have often been made for publicity purposes rather than specifically for the benefit of disabled customers; in other words, the businesses want to be seen to be making adaptations for disabled people so as to be viewed as caring and charitable by the economically strong (generally able-bodied) members of society.[274]

In other words, economic power is the prerequisite for success. Thus, economic advances furthered by employment and welfare reform may be the crucial first step in the effort for change in social attitudes that will lead to integration on a plane of equality.

CONCLUSION

Law is an imperfect tool, but it is one with an important role in stopping harassment and promoting integration of people with disa-

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273. Rosemarie Garland Thomson, *Seeing the Disabled: Visual Rhetorics of Disability in Popular Photography*, *in* THE NEW DISABILITY HISTORY, *supra* note 50, at 335, 368 (describing the "rhetoric of the ordinary"). In Thomson's article, this passage is accompanied by a reproduction of a clothing advertisement that features an attractive male who has a prosthesis in place of a right hand. *See id.* at 369.

274. Simon Ungar, *Disability and the Built Environment*, Distance Education Centre, University of Sheffield, *at* http://fhis.gcal.ac.uk/PSY/sun/LectureNotes/city/city.html (last visited Mar. 10, 2003).

bilities into the mainstream of employment and education. The recasting of approaches to existing law that I suggest, the use of 42 U.S.C. § 12203(b) and correction of IDEA exhaustion doctrine, are an exceedingly modest first step. Legislative reform with regard to vocational services, affirmative action and job set-asides, as well as welfare policy improvements, sets a much more ambitious agenda. Reforming the whole of society's attitudes is an enormous, though in my view, quite realistic task. In working for these changes, there is no better inspiration than Stanley S. Herr, the individual whose life work this symposium celebrates.[275]

275. *See In Memoriam: Stanley S. Herr*, 8 CLINICAL L. REV. 287, 289-314 (2002) (featuring articles discussing Stanley S. Herr's life and career).